No. 85-330

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

In the Matter of
GLENWOOD T.V., INC., a Corporation,
Appellant,

vs.

BRUCE C. RATNER, as Commissioner of the Department of Consumer Affairs of the City of New York,
Appellee.

In the Matter of
CHARLES T.V., INC., a Corporation,
Appellant,

vs.

BRUCE C. RATNER, as Commissioner of the Department of Consumer Affairs of the City of New York,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

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August, 1985

Question Presented

Whether sections B32-472.0(5) and 773-13.0 of the Administrative Code of the City of New York, which provide for warrantless, non-consensual inspections of commercial premises and property in the absence of judicial authorization, violate the Fourth Amendment of the Constitution of the United States.

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IN THE

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No.

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In the Matter of
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vs.

BRUCE C. RATNER, as Commissioner of the Department of Consumer Affairs of the City of New York,

Appellee.

Jurisdictional Statement

GLENWOOD T.V., INC., and CHARLES T.V., INC., corporations and the appellants each appeal from the final judgment of the Court of Appeals of the State of New York, dated May 28, 1985, affirming the judgment and order of the Supreme Court, Appellate Division, Second Department entered in favor of the Appellee BRUCE C. RATNER, as Commissioner of the Department of Consumer Affairs of the City of New York, holding that sections B32-472.0(5) and 773-13.0 of the Administrative Code of the City of New York are constitutional and not violative of the Fourth Amendment of the United States Constitution.

Opinions Below

The order of the Court of Appeals of the State of New York which appears at page 1a, *infra,* is reported at 65 N.Y.2d 642, — N.Y.S.2d —, — N.E.2d — (1985). By this opinion, the Court of Appeals affirmed the judgment of the Appellate Division of the Supreme Court, Second Department expressly on the constitutional issue. The order and judgment of the Appellate Division, which appears at page 2a, *infra,* is reported at 103 A.D.2d 322, 480 N.Y.S.2d 98 (2d Dept. 1984).

The Order and Judgment in favor of appellants GLENWOOD T.V., INC., and CHARLES T.V. INC., which found sections B32-472.0(5) and 773-13.0 of the Administrative Code of the City of New York to be unconstitutional and violative of the Fourth Amendment of the United States Constitution, appears at pages 36a, 52a and 55a, *infra.* This trial court decision is not reported.

The administrative decision which was rendered following a hearing before the New York City Department of Consumer Affairs and which imposed fines and ultimately revoked appellants' licenses as the result of their refusal to permit a warrantless, non-consensual search of their business premises and records is not reported. It is reprinted in the Appendix hereto, page 58a, *infra.*

Jurisdiction

This appeal arises from an administrative proceeding in which penalties and license revocations were imposed upon appellants by a muncipal agency as the result of their refusal to permit warrantless, non-consensual searches of their respective business premises. The searches were conducted pursuant to sections B32-472.0(5) and 773-13.0 of the Administrative Code of the City of New York. Appel-

lants sought judicial review of the administrative action, and such review resulted in the annulment of the administrative determination and a declaration that sections B32-472.0(5) and 773-13.0 of the Administrative Code of the City of New York were unconstitutional and violative of the Fourth Amendment of the United States Constitution. *See* page 51a, *infra.* On consolidated appeal, the majority of the Appellate Division reversed and found that the contested sections of the Administrative Code were constitutional. *See* page 3a, *infra.* Upon appeal to the highest court of the state, the Court of Appeals of the State of New York affirmed the judgment of the Appellate Division in favor of appellee, BRUCE C. RATNER. The Court of Appeals affirmed on the basis of the constitutional issue, explicitly stating that the affirmance was "for the reasons stated in so much of the opinion . . . as deals with the constitutional issue." 65 N.Y.2d 642, 644, — N.Y.S.2d —, — N.E.2d —. Such judgment was entered on May 29, 1985. *See* page 1a, *infra.*

A Notice of Appeal to this Court was duly filed in the Court of Appeals of the State of New York and the Supreme Court of the State of New York, County of Kings on July 31, 1985. *See* page 63a, *infra.*

This appeal is being docketed in this Court within ninety days from the date the judgment was rendered by the Court of Appeals of the State of New York. The jurisdiction of this Court is invoked under Title 28, United States Code Section 1257(2).

Constitutional Provisions, Municipal Ordinances

A. Fourth Amendment, United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable

searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

B. Section B32-472.0(5) of the Administrative Code of the City of New York:

A service dealer shall maintain such additional records as are required by regulations adopted by the commissioner to carry out the provisions of this article. Such records shall be open and available for reasonable inspection by the commissioner or other law enforcement officials, and shall be kept for a period of three years.

(This Administrative Code Section is set forth in its entirety at page 72a, *infra*).

C. Section 773-13.0 of the Administrative Code of the City of New York:

Inspection; display of license. a. All licensed vehicles or places of business shall be regularly inspected, and reports thereof shal be made to the commissioner.

(This Administrative Code Section is set forth in its entirely at page 70a, *infra*).

Statement of the Case

Appellants GLENWOOD T.V., INC., and CHARLES T.V., INC., are television and radio repair businesses which are licensed by the appellee, the New York City Department of Consumer Affairs pursuant to Chapter 32, Title B, Article 44 of the Administrative Code of the City of New York. Section B32-472.0 of New York City's Administra-

tive Code, set forth at page 71a, *infra,* prescribes certain "Duties of Licensees" which, in addition to various regulations (*see* page 74a, *infra*) require, *inter alia,* appellants to retain copies of customer invoices, estimates, work orders and final bills and that such records "shall be open and available for reasonable inspection by the commissioner or other law enforcement officials, and shall be kept for a period of three years." Administrative Code, § B32-472.0(5). In the event that a service dealer violates any provision of the ordinance or the regulations promulgated thereunder, or fails "to comply with any order, demand, regulation or requirement made by the commissioner pursuant to the provisions of this article," the commissioner may impose a fine or may deny renewal of, suspend, or revoke the dealer's license. Administrative Code, § B32-475.0 subds. (h) and (i). *See* page 72a, *infra.*

In 1979, after having made several allegedly routine inspections within the previous twelve months at the businesses operated by each of the appellants, investigators of the Department of Consumer Affairs of the City of New York arrived at appellants' premises on June 6 and 22, 1979, respectively. The inspectors determined that appellants' licenses and consumer disclosure signs were properly displayed (*see* Administrative Code § 773-13.0, page 70a, *infra*), and thereafter demanded to see the business records covering the last three years of business activity. Appellants, small businessmen, had each suffered substantial disruptions of their retail activities during each of the previous inspections. Consequently, each refused to provide the materials and permit inspection unless a search warrant was produced or each was informed that a complaint against it had been made. Since no complaint had been registered, no investigation was pending, no investigative subpoena had been issued and further, since no search

warrant had been obtained, both appellants refused to permit further inspection.[1]

The issue on this appeal is, therefore, whether the Fourth Amendment of the United States Constitution is violated by a municipal ordinance which authorizes the administrative imposition of the penalty of license revocation and concomitant loss of financial livelihood as the result of a person's refusal to permit a search of his property by numerous unspecified government agents in the absence of a warrant or some other form of antecedent judicial authorization.

28 U.S.C. § 2403(b) may be applicable in this case.

Raising the Federal Question

At the earliest possible moment in this action, the appellants raised the substantial claim that the action of the New York City Department of Consumer Affairs constituted a search which violated the guarantees of the Fourth Amendment of the United States Constitution.

At the administrative agency level, appellants established each of the necessary factual elements upon which the constitutional question is predicated. In accordance with appellees' own rules, appellants properly exhausted all possible administrative remedies before seeking judicial review. This fact was explictly acknowledged by the Department of Consumer Affairs in its letter to appellants, dated February 25, 1980, wherein it stated, "[a]ll administrative

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[1] Section B32-478.0 (subds. 1, 2) of the Administrative Code, reproduced at page 73a, *infra*, sets forth "Powers and duties of the commissioner" and authorizes broad investigatory powers buttressed by the authority to compel the attendance of witnesses and the production of books and records in accordance with the Civil Practice Law and Rules, a reference to the use of subpoenas. *See* New York C.P.L.R. Article 23.

remedies having been exhausted, you may seek judicial review pursuant to Article 78 of the CPLR."[2]

Following appellees' letter of February 25, 1980, appellants sought judicial revew by commencing a special proceeding before the Special Term of the Supreme Court of the State of New York, County of Kings, in accordance with the provisions of Article 78 of the New York Civil Practice Law and Rules. Therein, appellants asserted that the system of admnistrative inspections imposed by appellees and the searches that appellees attempted are repugnant to the Fourth Amendment of the United States Constitution, the precise constitutional issue that appellants raise before this Honorable Court. The Special Term Justice concurred with appellants' arguments and held that the challenged Administrative Code sections were unconstitutional and violative of the Fourth Amendment insofar as they purport to authorize non-consensual, periodic, warrantless inspections.

Appellees appealed from the judgment of the Supreme Court, Special Term. On appeal to the Appellate Division, Second Judicial Department, appellants again pressed their Fourth Amendment challenge. The Appellate Division divided, three to two, and reversed the judgment of the Supreme Court. The majority held that a warrant was not constitutionally required because appellants did not necessarily possess Fourth Amendment rights in the area or items searched. In a strongly worded dissent, Justices Gibbons and Bracken argued that the Administrative Code sections were unconstitutional insofar as they purport to authorize non-consensual inspections without either a warrant or its functional equivalent.

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[2] Under New York State law, constitutional challenges to administrative actions are properly raised at the initial judicial review stage. *See Watergate II Apartments* v. *Buffalo Sewer Authority*, 46 N.Y.2d 52, 412 N.Y.S.2d 821, 385 N.E.2d 560 (1978).

In its appeal to the state's highest tribunal, the New York Court of Appeals, appellants reasserted their Fourth Amendment challenge. The Court of Appeals, however, affirmed the decision of the majority of the Appellate Division, specifically indicating that their affirmance was upon the constitutional issues raised below.

Thus, the precise constitutional issues that are presently raised before this Honorable Court have been argued by the parties and reviewed by all three levels of the judicial system of the State of New York.

The Question Is Substantial

A. Fourth Amendment Principles as Applied to the Instant Case.

The Fourth Amendment of the Constitution of the United States prohibits searches and seizures by governmental authorities in the absence of a warrant. This Honorable Court held in *Camara* v. *Municipal Court,* 387 U.S. 523, 18 L.Ed 2d 930, 87 S.Ct. 1727 (1967) and *See* v. *Seattle,* 387 U.S. 514, 18 L.Ed 2d 943, 87 S.Ct. 1737 (1967), that the requirements of the Fourth Amendment apply to administrative inspections of commercial as well as private property, and necessitate the issuance of a warrant or its functional equivalent.

In *Camara, supra,* this Honorable Court applied the Fourth Amendment "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizure" to administrative inspections, and held that "except in certain carefully defined classes of cases, a search of private property without proper consent is unreasonable unless it has been authorized by a valid search warrant." *Camara* v. *Municipal Court, supra,* U.S. at 528-529, L.Ed 2d at 935. At issue in *Camara,* was the

validity of an ordinance which allowed a building inspector "the right to enter, at reasonable times, any building" in order to determine compliance with the city's housing code. *Id.*, U.S. at 526, L.Ed 2d at 934. Balancing the need for a warrantless search and the governmental purpose to be served thereby against the invasion which such a search entails, this Court held that a warrant was required and that, absent an emergency, a person could properly withhold his consent to a search of his house where there was no warrant. Inspections for the purpose of enforcing a building code were not, therefore, held to fall within the "carefully defined classes of cases" which are exempt from the warrant requirement. *Id.*, U.S. at 528, L.Ed 2d at 935.

In *See, supra,* decided on the same day as *Camara,* this Court held that the Fourth Amendment and the principles set forth in *Camara* were applicable to business as well as residential premises. Specifically, this Court concluded that "administrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure." *See* v. *Seattle, supra,* U.S. at 545, L.Ed 2d at 947 (footnote omitted).

Eleven years later, this Court reaffirmed that the owner of commercial premises must be provided with the constitutional protections afforded by the Fourth Amendment. "The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant." *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307,

312, 56 L.Ed 2d 305, 311, 98 S.Ct. 1816 (1978), *citing See* v. *Seattle, supra,* U.S. at 543 L.Ed 2d at 946.

In *Marshall* v. *Barlow's, Inc.*, this Court further indicated that an inspection of business records may not be effected without a warrant. In its opinion, this Court decided that:

> Delineating the scope of a search with some care is particularly important where documents are involved. Section 8(c) of [OSHA] provides that an employer must . . . make available to the Secretary . . . such records . . . as the Secretary of Labor may prescribe by regulation as necessary or appropriate for enforcement of the statute. . . .
>
> In describing the scope of the warrantless inspection authorized by the statute, § 8(a) [of OSHA] does not expressly include any *records* among those items or things that may be examined, and § 8(c)merely provides that the employer is to "make available" his pertinent records and to make periodic reports.

Id., U.S. at 324 n.22, L.Ed 2d at 318 (emphasis in original, quotation omitted).

Thus, this Court indicated that OSHA's authorization to inspect business documents without a warrant was violative of the Fourth Amendment. In so concluding, this Court stressed that a warrant was necessary to "advise the owner of the scope and objects of the search, beyond which limits the inspector is not expected to proceed. These are important functins for a warrant to perform, functions which underlie the Court's prior decisions that the Warrant Clause applies to inspections for compliance with regulatory statutes." *Id.*, U.S. at 323-324, L.Ed 2d at 318 (footnote omitted).

The system of warrantless inspections which has been implemented by the Department of Consumer Affairs, and

which is directly at issue in this appeal, is presumptively unreasonable.

> [I]t is axiomatic that "searches conducted outside the judicial process, *without prior approval by judge or magistrate, are per se unreasonable* under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."

Colorado v. *Bannister,* 449 U.S. 1, 2-3, 66 L.Ed 2d 1, 3, 101 S.Ct. 42 (1980) (emphasis supplied), *quoting Katz* v. *United States,* 389 U.S. 347, 357, 19 L.Ed 2d 576, 88 S.Ct. 507 (1967). *Accord, Camara* v. *Municipal Court, supra; Marshall* v *Barlow's, Inc., supra; Michigan* v. *Tyler,* 436 U.S. 499, 56 L.Ed 2d 486, 98 S.Ct. 1942 (1978); *Thompson* v. *Louisiana,* 469 U.S. ——, 83 L.Ed 2d 246, 250, 105 S.Ct. —— (1984).

Thus, an inspection which is imposed without the intervention of some aspect of judicial process, or some form of prior judicial approval has been deemed to be *per se* unreasonable by this Court.

In order to protect the appellants against the potential discretionary abuses incurred during an administrative inspection, a warrant to search must be issued by a neutral judicial officer, for it is "the procedure of antecedent justification . . . that is central to the Fourth Amendment." *Katz* v. *United States, supra,* U.S. at 359, L.Ed 2d at 586, *citing Osborn* v. *United States,* 385 U.S. 323, 330, 17 L.Ed 2d 394, 400, 87 S.Ct. 429 (1966).

Prior judicial approval of a proposed inspection provides the guarantee of reasonableness which is required by the Fourth Amendment. It provides a mechanism for weighing the competing interests affected by the inspection: the government's need to search against the degree of intrusion imposed upon the licensee. Therefore, the importance of

an administrative warrant has been repeatedly stressed by this Court. "[T]he magistrate can perform the important function of preventing harassment by keeping that invasion to a minimum." *Michigan* v. *Tyler, supra,* U.S. at 508, L.Ed 2d at 497; *see See* v. *Seattle, supra; Marshall* v. *Barlow's, Inc., supra.*

"The authority to make warrantless searches devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search. A warrant, by contrast, would provide assurances from a neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria." *Marshall* v. *Barlow's, Inc., supra,* U.S. at 323, L.Ed 2d at 317-318 (footnote omitted). "Omission of such [judicial] authorization bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment." *Katz* v. *United States, supra,* U.S. at 358, L.Ed 2d at 586 (quotation omitted).[3]

Thus some form of antecedent judicial authorization is an intrinsic element to a lawful search. If not articulated in the form of a warrant, the necessary element of judicial process is frequently fulfilled by an administrative subpoena. "[W]hile the demand to inspect may be issued by the agency, in the form of an administrative subpoena, it may not be made and enforced by the inspector in the field, and the subpoenaed party *may obtain judicial review of the*

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[3] It is clear that an administrative agency is afforded great flexibility in the issuance of a warrant insofar as "probable cause in the criminal sense is not required." *Marshall* v. *Barlow's, supra,* U.S. at 320, L.Ed 2d at 316.

reasonableness of the demand prior to suffering penalties for refusing to comply." See v. *Seattle, supra,* U.S. at 544-545, L.Ed 2d at 947 (emphasis added). *See Donovan* v. *Lone Steer,* —— U.S. ——, 78 L.Ed 2d 567, 104 S.Ct. —— (1984).

In addition to the issuance of a warrant or a subpoena, it has been held that the requirement of judicial intervention may be satisfied by injunctive enforcement of the inspection sought by the agency. When the agency "seeks an injunction . . . to allow it access to inspect records, the judicial inquiry with regard to . . . reasonableness is similar to that employed when another agency seeks enforcement of its subpoena or summons." *ICC* v. *Gould,* 629 F.2d 847, 860 (3d Cir. 1980); *see Donovan* v. *Dewey,* 452 U.S. 594, 69 L.Ed 2d 262, 101 S.Ct. 2534 (1981). Thus, a regulatory scheme which requires an agency to invoke judicial process, and obtain injunctive enforcement *prior* to the imposition of an inspection or consequential penalties, may be upheld under the Fourth Amendment, insofar as it provides a specific mechanism for safeguarding constitutional rights. *Donovan* v. *Dewey, supra.*

Appellants recognize that in certain very limited circumstances, industries which are "closely regulated" and "long subject to close supervision and inspection" or which are "pervasively regulated" can be subjected to warrantless inspections. *United States* v. *Biswell,* 406 U.S. 311, 316, 32 L.Ed 2d 87, 92, 92 S.Ct. 1593 (1972), *Colonnade Catering Corp.* v. *United States,* 397 U.S. 72, 77, 25 L.Ed 2d 60, 65, 90 S.Ct. 774 (1970). Industries involving firearms (*Biswell, supra*), liquor (*Colonnade, supra*), and the like, come within the "carefully defined classes of cases" mentioned in *Camara, supra,* U.S. at 528, L.Ed 2d at 935. In such industries, warrantless inspections may advance urgent government interests which outweigh the interest in

privacy. *United States* v. *Biswell, supra,* U.S. at 315-317, L.Ed 2d at 92. Nonetheless, even when an industry is pervasively regulated or has a long history of close supervision, there are important caveats. Warrantless searches are not automatically constitutional. Rather the legislature must specifically authorize inspections without a warrant, and the regulatory inspection system must be "carefully limited in time, place and scope." *Id.*, U.S. at 315, L.Ed 2d at 92. As more recently expressed by this Court in a case involving the pervasively regulated mining industry, the legislature must have "reasonably determined that warrantless searches are necessary to further a regulatory scheme and the . . . regulatory presence [must be] sufficiently comprehensive and defined [so] that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes". *Donovan* v. *Dewey, supra,* U.S. at 600, L.Ed 2d at 270.[4]

Even an inspection plan which is carefully limited in time, place and scope may not constitutionally authorize inspections without prior judicial approval. Such approval may *only* be dispensed with when the industry involved has been pervasively or historically regulated and where the legislature has reasonably determined that warrantless searches are *necessary* to monitor the particular industry. *Donovan* v. *Dewey, supra; United States* v. *Biswell, supra;*

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[4] Even under the compelling circumstances present in *Donovan,* this Court specifically emphasized that the requirement of prior judicial authorization was satisfied because the Mine Safety Act required the Secretary of Labor to institute a civil action in Federal Court to compel compliance with a proposed inspection. As this Court recognized: "This proceeding provides an adequate forum for the mine owner to show that a specific search is outside the federal regulatory authority, or to seek from the district court an order accommodating any unusual privacy interests that the mine owner might have." *Id.*, U.S. at 604-605, L.Ed 2d at 272-273.

Colonnade Catering Corp. v. *United States, supra.* Absent affirmative findings as to these two requirements, statutory or regulatory safeguards *cannot* substitute for the individualized judicial review imposed by a warrant procedure. *Camara* v. *Municipal Court, supra.*

In this case, the Administrative Code of the City of New York permits the Department of Consumer Affairs as well as a multitude of other governmental agents to conduct warrantless inspections. By its failure to require either a warrant, a subpoena, or an injunctive order to compel compliance with its regulations, the contested inspection scheme is rendered fatally defective.

Although the majority of the Appellate Division explicitly recognized that prior judicial review is constitutionally required, it erroneously presumed that the Department had to resort to judicial process and that the licensees thereby had an adequate forum to obtain judicial review prior to the enforcement of the inspection demand. *Infra* at 16a-17a. In fact, the administrative orders were self-executing inasmuch as the appellee possessed and exercised the authority to suspend and revoke a license independently, without judicial intervention. Administrative Code sections B32-475.0, *infra* at 72a, 773-4.0(e) *infra* at 69a. The only means of judicial review available to the appellants was a Special Proceeding *following* the revocation of their licenses, a procedure which blatantly fails to afford the licensee the mandated opportunity to obtain judicial review *prior* to the imposition of a penalty for refusing to comply with the inspection demand. *See* v. *Seattle, supra,* U.S. at 544-545, L. Ed 2d at 947, *see Marshall* v. *Barlow's, Inc., supra,* U.S. at 325 n.23, L. Ed 2d at 319.

Clearly, the subject of the searches imposed in this case is not a constituent of a historically or pervasively regulated

industry and thus does not fit within any of the exceptions which have been recognized for dispensing with the warrant requirement. In effect, by its opinion the Appellate Division majority as affirmed by the Court of Appeals, has countenanced the type of regulatory scheme rejected by this Court in *Marshall* v. *Barlow's* and has unique exception to the warrant requirement of the Fourth Amendment.[5] Thus, we submit, the limited exceptions recognized by *Camara* and its progeny have been so expanded as to subvert the rights which the Fourth Amendment has traditionally protected.[6]

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[5] In *Marshall* v. *Barlow's, supra,* U.S. at 324 n.22, L.Ed 2d at 318, this Court was critical of a statutory scheme which permitted warrantless inspections of records which were unspecified in the authoritative statue. This Court disapproved of the fact that the specification of the records subject to such inspection had been delegated to the administrative agency. In the present case, an identically improper and excessive delegation of authority has occurred.

[6] Appellants emphasize that, heretofore, there has been no required records exception to the Fourth Amendment. As previously argued in the courts below, all of the cases that appellee has cited in support of the alleged pre-existence of such a purported "required records" exception involved some form of prior judicial intervention such as a subpoena or an injunction.

Whether the documents which were the object of the search properly constitute "required records" is an issue which was not addressed by the courts below. As is set forth in *Grosso* v. *United States,* 390 U.S. 62, 67-68, 19 L.Ed 2d 906, 912, 88 S.Ct. 709 (1968) in order to constitute required records: 1) the records must be essentially regulatory, 2) the records must be of a kind customarily kept by the regulated party, and 3) the records themselves must have assumed "public aspects" which render them analagous to public documents. *See also, In Re Doe,* 711 F.2d 1187 (2d Cir. 1983). "It may be assumed at the outset that there are limits which the government cannot consitutionally exceed in requiring the keeping of records which may be inspected by an administrative agency . . . ." *Shapiro* v. *United States,* 335 U.S. 1, 32, 92 L.Ed 1787, 68 S.Ct. 1375 (1948).

B. The Constitutional Issue Presented by the Instant Facts Has Arisen in Numerous Jurisdictions and Has Resulted in Conflicting Judicial Pronouncements.

The problem of delimiting the permissible scope of business inspections is not one which is *sui generis* to New York. As the following survey indicates, courts of other jurisdictions have variously interpreted and applied the principles set forth by this Court in *See, Camara* and *Marshall* v. *Barlow's* with divergent results.

In *State Real Estate Commission* v. *Roberts,* 441 Pa. 159, 271 A.2d 246 (1970), *cert. denied,* 402 U.S. 905, 28 L. Ed 2d 645, 91 S. Ct. 1367 (1971), the Supreme Court of Pennsylvania was called upon to determine the constitutionality of a statute which authorized warrantless administrative inspections of a real estate broker's records and escrow account. On appeal from the decision of a divided court below, the majority held that the search did not require "a judicial determination of the reasonableness of the demands made by the inspector." *Id.,* A.2d at 279. On the basis of *See,* the minority issued a dissenting opinion in which it found the proposed inspection to be unconstitutonal and stated, "[i]t is thus clear that a subpoena or warrant is required when an administrative agency wishes to inspect business permises, books and records, even if required to be kept by statute." *Id.,* A.2d at 250-251.

In addition to the decision rendered in *State Real Estate Comm.* v. *Roberts, supra,* other courts have rendered opinions which have, on the basis of various justifications, sustained warrantless administrative inspections:

In *Comm'r., Dept. of Labor & Indus.* v. *Altemose Const. Co.,* 368 A.2d 857 (Pa. Cmwlth. 1977), the Commonwealth Court of Pennsylvania, relying upon *State Real Estate Comm., supra,* held that an inspection of wage

records was not violative of the Fourth Amendment. The Commonwealth Court predicated its decision upon the fact that, in accord with Pennsylvania statutes, the appellant-contractor's contract included a provision which required that the appellant consent to said inspection.

In *Mendez* v. *Arizona State Bd. of Pharmacy,* 129 Ariz. 89, 628 P. 2d 972 (Ariz. App. 1981) the Court of Appeals of Arizona, in a decision not inconsistent with appellants' present argument, held that *See* was inapplicable to a warrantless administrative search of pharmacy records. Applying the *Biswell* doctrine, the court held that "[w]here a statutory regulatory scheme specifically authorizes warrantless searches, and such regulatory inspections further an urgent governmental interest, the inspection may proceed without a warrant." *Id.,* P.2d at 974.

Several courts have issued decisions finding warrantless administrative searches to be unconstitutional in accordance with the arguments propounded by appellants herein:

In *Yocom* v. *Burnette Tractor Co., Inc.,* 555 S.W.2d 823 (Ky. App. 1977) the Court of Appeals of Kentucky applied this Court's decision in *See* and held that in the absence of a showing that a business is inherently dangerous, or regulated "such as guns, liquor or drugs; or pervasively regulated or an industry with a long history of regulation, a[n OSHA] seach of the premises, i.e., those portions of the premises not customarily opened to the public, will not be permitted without a search warrant or court order." *Id.,* at 825.

The United States District Court for the Southern District of Ohio, in *Pentco., Inc.* v. *Moody,* 474 F. Supp. 1001 (S.D. Ohio 1978) held, *inter alia,* that once a municipality had issued a business license to a massage parlor, and despite recognized societal concern regarding such establish-

ments, the court found "no compeling interest justifying the intrusion" and held the municipality could not require an inspection of the premises and records in the absence of either a warrant or the owner's consent. *Id.*, at 1009.

Similarly, in *State* v. *Huddleston*, 412 A.2d 1148 (Del. Super. 1980), the Superior Court of Delaware, when faced with the compelling public interest regarding adult book stores and pornographic material, held that an adult bookstore was not a pervasively regulated industry and found constitutionally infirm the statute which permitted warrantless inspections of business records. The court also held that the holders of records possessed an expectation of privacy despite the fact that they were required records. The court additionally found the statute infirm because it conferred inspection authority on "any peace officer. The statute thus creates an invitation to random and standardless inquiry by any peace officer so inclined. So applied, the statute presents an obvious case of governmental intrusion which is *per se* unreasonable." *Id.*, at 1157.

In *Rush* v. *Obledo*, 517 F. Supp. 905 (N.D. Calif. 1981), the United States District Court, Northern District of California held, *inter alia*, that despite a long history of state involvement in day care centers and justifiable governmental concern for such facilities, the warrantless entry into family day care homes could be justified neither under the "closely regulated industry" exception to the warrant requirement, nor on a general "reasonableness" basis upon balancing the interests of the state against those of the individual. The court reached this conclusion only after examining a wide array of cases concerning warrantless administrative searches and reasoned that "family day care homes are more like the contexts in which warrantless inspections have been struck down, than they are like those in which such inspections have been upheld." *Id.*, at 910 n.7.

Appellants respectfully submit that inspections of family day-care facilities, adult book stores and message parlors clearly raise substantial and compeling governmental regulatory interests. Since said interests have been found insufficient to justify warrantless administrative searches, the obviously inferior governmental interest in regulating television and radio repair stores clearly cannot sustain the warrantless administrative searches attempted in the present case. We further submit that the divergence of opinons reflected in the aforementioned cases is an important reason for this Court to note probable jurisdiction of this case and render a clarifying opinion, settling the substantial issue raised herein.

Conclusion

The issue herein is so substantial in its effect upon the constitutional rights confered upon the citizens of the United States as to require plenary consideration, with briefs on the merits and oral argument for its resolution. For these reasons, this Court should not probable jurisdiction of this appeal.

Respectfully submitted,

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APPENDIX

Decision of the Court of Appeals of the State of New York

No. 240

In the Matter of Glenwood TV, Inc.,

Appellant,

v.

Bruce C. Ratner, as Commissioner of the Department of Consumer Affairs of the City of New York,

Respondent.

and another proceeding:
Mtr of Charles TV v Ratner

Order affirmed, with costs, for the reasons stated in so much of the opinion by former Justice Vito J. Titone at the Appellate Division as deals with the constitutional issue (103 AD2d 322). Chief Judge Wachtler and Judges Jasen, Meyer, Simons, Kaye and Alexander concur. Judge Titone took no part.

Decision Court of Appeals
May 29, 1985

Order and Decision of the Supreme Court of the State of New York Appellate Division—Second Judicial Department

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on September 17, 1984

HON. VITO J. TITONE,
Justice Presiding,
HON. DAVID T. GIBBONS,
HON. WILLIAM C. THOMPSON,
HON. LAWRENCE J. BRACKEN,
HON. ISAAC RUBIN.
Associate Justices

In the Matter of Glenwood TV, Inc.,
Respondent,

v.

Bruce C. Ratner, as Commissioner of the Department of Consumer Affairs of the City of New York,
Appellant.

(Action No. 1)

In the Matter of Charles TV, Inc.,
Respondent,

v.

Bruce C. Ratner, as Commissioner of the Department of Consumer Affairs of the City of New York,
Appellant.

(Action No. 2)

ORDER

In the above entitled actions, the above named Bruce C. Ratner, etc., respondent in the court below, having appealed

to this court from two judgments of the Supreme Court, Kings County, both entered July 20, 1981, which, *inter alia,* declared sections B32-472.0 (subd 5) and 773-13.0 of the Administrative Code of the City of New York unconstitutional insofar as they purport to authorize nonconsensual periodic inspections of the records of licensed television and radio repair businesses without a search warrant; and the said appeal having been argued by David Drueding, Esq., of counsel for appellant and argued by Ronald M. Kleinberg, Esq., of counsel for respondents, due deliberation having been had thereon; and upon OPINION by TITONE, J.P., and decision slip of the court heretofore filed and made a part hereof, it is

ORDERED that the judgments appealed from are hereby reversed, on the law, with one bill of costs, the determinations of the Department of Consumer Affairs confirmed, and the proceedings dismissed on the merits, and it is hereby declared that sections B32-472.0 (subd 5) and 773-13.0 of the New York City Administrative Code are constitutional.

THOMPSON and RUBIN, JJ., concur in the OPINION of TITONE, J.P.

GIBBONS and BRACKEN, JJ., dissent in part and vote to modify the judgments appealed from, with an OPINION by GIBBONS, J., in which BRACKEN, J., concurs.

Enter:

IRVING N. SELKIN

Order and Decision—Appellate Division

VITO J. TITONE,
J.P.
DAVID T. GIBBONS
WILLIAM C. THOMPSON
LAWRENCE J. BRACKEN
ISAAC RUBIN,
JJ.

A—January 4, 1983

In the Matter of Glenwood TV, Inc.,
Respondent,

v.

Bruce C. Ratner, as Commissioner of the Department of Consumer Affairs of the City of New York,
Appellant.

(Action No. 1)

In the Matter of Charles TV, Inc.,
Respondent,

v.

Bruce C. Ratner, as Commissioner of the Department of Consumer Affairs of the City of New York,
Appellant.

(Action No. 2)

Frederick A. O. Schwarz, Jr., Corporation Counsel; New York, N.Y. (Leonard Koerner and David Drueding of counsel), for appellant.

Meissner, Tisch & Kleinberg, New York, N.Y. (Ronald M. Kleinberg, Laurel J. Weinberg and Gino Josh Singer of counsel), for respondents.

Order and Decision—Appellate Division

Two judgments of the Supreme Court, Kings County (JORDAN, J.), both entered July 20, 1981, reversed, on the law, with one bill of costs, determinations of the Department of Consumer Affairs confirmed, and proceedings dismissed on the merits, and it is declared that sections B32-472.0 (subd 5) and 773-13.0 of the New York City Administrative Code are constitutional.

OPINION by TITONE, J.P.

THOMPSON and RUBIN, JJ., concur.

GIBBONS, J. dissents in part and votes to modify the judgments appealed from, with an opinion, in which BRACKEN, J. concurs.

Order and Decision—Appellate Division

SUPREME COURT

APELLATE DIVISION

SECOND JUDICIAL DEPARTMENT

September 17, 1984

TITONE, J.P.,

GIBBONS, THOMPSON, BRACKEN and RUBIN, JJ.

IN THE MATTER OF GLENWOOD TV, INC.

Respondent,

—against—

BRUCE C. RATNER,
as Commissioner of the Department of Consumer Affairs of the City of New York,

Appellant.

(Action No. 1)

IN THE MATTER OF CHARLES TV, INC.,

Respondent,

—against—

BRUCE C. RATNER,
as Commissioner of the Department of Consumer Affairs of the City of New York,

Appellant.

(Action No. 2)

CONSOLIDATED APPEALS from two judgments of the Supreme Court (ANTHONY T. JORDON, J.), both entered July 20, 1981 in Kings County, which, *inter alia,* declared

sections B32-472.0 (subd 5) and 773-13.0 of the Administrative Code of the City of New York unconstitutional insofar as they purport to authorize nonconsensual periodic inpections of the records of licensed television and radio repair businesses without a search warrant.

Frederick A. O. Schwarz, Jr., Corporation Counsel, New York, N.Y. (Leonard Koerner and David Drueding of counsel), for appellant.

Meissner, Tisch & Kleinberg, New York, N.Y. (Ronald M. Kleinberg, Laurel J. Weinberg and Gino Josh Singer of counsel), for respondents.

TITONE, J.P.

The Commissioner of the New York City Department of Consumer Affairs appeals from two judgments of the Supreme Court, Kings County, which declared sections B32-472.0 (subd 5) and 773-13.0 of the Administrative Code of the City of New York unconstitutional insofar as they purport to authorize nonconsensual periodic inspections of the records of licensed television and radio repair businesses without a search warrant, and annulled determinations suspending the petitioners' licenses and imposing fines for a willful refusal to permit such inspections.[1] A majority of this court finds the legislation to be constitutional and, therefore, reverses the two judgments.

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[1] Special Term's opinion also purported to require that the Department of Consumer Affairs give licensees advance written notice of at least one week of any inspection, and the opportunity to reschedule inspections at more convenient times. The signed judgments, however, omit these requirements.

Order and Decision—Appellate Division

I

In 1973, the New York City Council enacted New York City Local Law No. 74 of 1973 (New York City Administrative Code, ch 32 tit B, art 44, §§ B32-465.0, *et seq.*), which provides for the licensing and regulation of individuals and entities engaged in servicing or repairing television, radio or audio equipment. The City Council, which had studied the matter for several years (see *Metropolitan Electronic Tel. Serv. Dealers Assn.* v. *Guggenheimer*, NYLJ, July 2, 1975, p. 12, col 5, affd 51 AD2d 922, mot for lv to app den 39 NY2d 709), concluded that the business had "become the subject of great abuse. The public has been and is unprotected from unethical and financially unstable service dealers. The necessity for legislative intervention to protect the public and legitimate service dealers * * * [was] declared as a matter of legislative determination" (Administrative Code, § B32-465.0).

The statutory scheme and the implementing regulations promulgated by the Commissioner of Consumer Affairs provide for the licensing of such repair and service dealers and comprehensive disclosure rules designed to insure that the consumer is sufficiently apprised of the anticipated costs and of the obligations undertaken by repairmen.[2] A licensee is thus required to conspicuously post its license and a sign advising consumers of their rights (Administrative Code. § 773-13.0; Department of Consumer Affairs, Rules and Regulations Relating to Television, Radio and Audio Equipment, Phonograph Service and Repairs, City Record, January 23, 1975, pp 264-266). In addition, all work per-

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[2] The provisions of Local Law No. 74 of 1973 and the implementing regulations were sustained in *Metropolitan Electronic Tel. Serv. Dealers Assn.* v. *Guggenheimer* (NYLJ, July 2, 1975, p 12, col 5, affd 51 AD2d 922, mot for lv to app den 39 NY2d 709).

formed by the licensee is to be recorded on an invoice containing the license number and other details and a copy delivered to the customer and a copy retained by the licensee for a period of three years (Administrative Code, § B32-472.0, subd 1). Such invoices and other records required by regulation "shall be open and available for reasonable inspection by the commissioner or other law enforcement officials, and shall be kept for a period of three years" (Administrative Code, § B32-472.0, subd 5).

The legislation also directs the Commissioner of Consumer Affairs to conduct periodic inspections to insure that licensees comply with the terms of their license and governing regulatory provisions (Administrative Code, § 773-13.0). To that end, the commissioner has instituted a random computer selection method whereby licenses are regularly inspected about once a year and, to limit the scope of the inspection, inspectors are provided with a form which they are to follow.

II

We turn, then, to a review of the factual background of the case now before us.

On June 6, 1979 and June 22, 1979, respectively, Inspector Joseph Laura of the Department of Consumer Affairs arrived at the store fronts of Glenwood TV, Inc. and Charles TV, Inc., both of which were licensed pursuant to the Administrative Code. Upon entering the area open to the public at each location, he first checked to see that the required signs informing consumers of their general legal rights were conspicuously posted. Finding that they were, he then asked each proprietor for a sampling of the estimates, work orders and final bills that they were required to keep. On both occasions this request was refused. There is no indication or claim that the inspector attempted to

enter any area of the business not otherwise accessible to the general public. Nor does either party contend that the statutes in question purport to auhorize such entry or that inspectors make such entries without the consent of the proprietor.

Consequently, administrative charges were filed against both licensees, and, on consent, the actions were consolidated for the purpose of a hearing, which was held on November 13, 1979. At the hearing, both licensees admitted their refusal to supply the requested documentation, stating that their refusal was prompted by instructions from the Metropolitan Electronic Television Service Dealers Association's counsel to supply this documentation only when inspections are conducted in response to specific consumer complaints and to refuse when subjected to periodic inspection. It was the association's position, adopted by both licensees at the hearing, that these periodic inspections were too frequent, as they took between an hour and two hours to complete, and were therefore unreasonably disruptive of small business operations.[3]

The Department of Consumer Affairs produced Principal Inspector Christopher Bossis and Inspector Joseph Laura to testify to the standard inspection procedures and those specifically employed with respect to these licensees. Principal Inspector Bossis stated that routine periodic inspection of dealers were randomly scheduled by computer about once a year and that it would be virtually impossible for a single licensee to be scheduled for regular inspection four

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[3] In support of these contentions, Mr. Pearlman, principal of Glenwood TV, testified that in the year preceding this refusal to produce these documents his business had been inspected at least four and as many as six times, with each inspection lasting one to two hours. Charles Goldberg of Charles TV similarly testified that he had been subjected to inspections two to three times in the preceding year with a similar imposition on his business.

to six times in one year. Both inspectors stated that the procedure employed should take a maximum of one half hour to complete and routinely last as little as 15 minutes. The presence of an inspector for more than a half-hour would only result if the inspection was interrupted by the entrance of customers during the inspection, as it is the department's practice to accommodate dealers by allowing them to interrupt the inspection and tend to customers. Indeed, one of the petitioners admitted that this was routinely done but claimed that inspections were nonetheless disruptive of customer relations because "[t]he shops are generally small, and the inspector can overhear anything that goes on, pertaining to your dealings with your consumers".

A written decision was rendered fining each licensee $300 and ordering them to "make available for inspection all required records requested by this Department" within five days of notice of the decision. The hearing officer found that the inspections were lawfully authorized by the City Council, that the inspections were reasonable in both frequency and duration, and that both licensees willfully refused to submit to them. The licensees were notified of the decision by a letter dated January 15, 1980, and, when they failed to comply with its terms, they were informed that their licenses would be suspended effective March 5, 1980. When the licensees further refused to surrender their licenses and cease operation pursuant to the notice of suspension, the department revoked their licenses.

The licensees did file administrative appeals, raising their constitutional claims for the first time, but the appeals were denied as untimely as both licensees had been granted an extension of time until February 8, 1980 to file an appeal, but had not done so until February 15, 1980.

Subsequently, petitioners commenced these proceedings to review the administrative determinations upon the ground that Local Law No. 74 of 1973 is, among other things, violative of their Fourth Amendment protections against warrantless searches and seizures (US Const, 4th Amdt). Special Term treated these proceedings as "hybrid proceedings for both Article 78 and declaratory relief",[4] and, in a far-ranging opinion, agreed with petitioners, and set forth elaborate notice and warrant requirements. We reverse.

III

At the outset, a matter of procedure must be addressed. While the petitioners' failure to exhaust administrative remedies does not bar a challenge to administrative action as either unconstitutional or beyond the agency's statutory power (*Watergate II Apts.* v. *Buffalo Sewer Auth.*, 46 NY 2d 52, 57; cf. *Matter of Celestial Food Corp. of Coram* v. *New York State Liq. Auth.*, 99 AD2d 25, 27), it does limit the scope of judicial review to the face of the statute itself (*Young Men's Christian Assn. v Rochester Pure Waters Dist.*, 37 NY2d 371, 375-378; cf. *Skylab Realty Corp.* v *New York Prop. Ins. Underwriting Assn.*, 96 AD2d 939). Accordingly, we must presume that the inspections were conducted in a reasonable fashion and accept the findings of the hearing officer (see *Young Men's Christian Assn.* v *Rochester Pure Waters Dist., supra*).

While, as petitioners urge, the city cannot require them to submit to blanket warrantless searches as a condition of licensing (see, e.g., *Matter of Finn's Liq. Shop* v *State Liq. Auth.*, 24 NY2d 647, 658, cert den 396 US 840), such an

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[4] No one has questioned the propriety of this procedure, and we do not pass on it.

approach begs the question now before us. The analysis of any search and seizure claim, and correspondingly the Fourth Amendment's warrant clause, must begin with a threshold determination of whether the subject of the search possesses a reasonable expectation of privacy in the area or items searched (*Rakas* v *Illinois*, 439 US 128, 143; *Katz* v *United States*, 389 US 347, 351; *People* v *Ponder*, 54 NY2d 160; *People* v. *Lerhinan*, 90 AD2d 74, 75). And, "unlike searches of private homes, which generally must be conducted pursuant to a warrant in order to be reasonable under the Fourth Amendment, legislative schemes authorizing warrantless administrative searches of commercial property do not necessarily violate the Fourth Amendment * * * The greater latitude to conduct warrantless inspections of commercial property reflects the fact that the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home" (*Donovan* v *Dewey*, 452 US 594, 598-599).

Significantly, petitioners do not complain here about the presence of an inspector on the public portions of their premises for determining that they have complied with applicable posting requirements. Indeed, any complaint would be futile because it is basic that there can be no reasonable expectation of privacy in public areas of a commercial establishment (see *Matter of Salob* v *Ambach*, 73 AD2d 756, 757, mot for lv to app den 49 NY2d 703, app dsmd 49 NY2d 800, cert den 449 US 829) for "[w]hat is observable by the public is observable, without a warrant, by government inspectors as well" (*Marshall* v *Barlow's Inc.*, 436 US 307, 315; cf. *People* v *Rizzo*, 40 NY2d 425, 428-429) and an inspector, like a customer, needs no judicial process to enter (*Donovan* v *Lone Steer*, —— US ——, 104 S Ct 769).

Instead, respondents focus on the records they are required by law to keep. They claim that such records need not be submitted for inspection to an inspector lawfully in their shop absent a warrant, and that no sanctions may be imposed for their failure to do so.[5]

The difficulty with this thesis is that the warrant clause has long been deemed inapplicable to "required records" which "are in the public domain" and, as a result, "their custodian is not afforded the traditional protections of the fourth or fifth amendments" (*United States* v *Pine Valley Poultry Distrs. Corp.*, 187 F Supp 455, 456-457; see, e.g., *Shapiro* v *United States*, 335 US 1, 32-34; *Boyd* v *United States*, 116 US 616, 623-624). It is clear that "the modern businessman has little or no expectation of privacy in his business records, especially those documents prepared in compliance with regulatory requirement" (*Interstate Commerce Comm.* v *Gould*, 629 F2d 847, 858, cert den 449 US 1077; cf. *Matter of Hynes* v *Moskowitz*, 44 NY2d 383, 395, app dsmd 439 US 921). Numerous authorities demonstrate this principle (see, e.g., *United States* v *Snyder*, 668 F2d 686, 690 [records of union pension and welfare fund required to be kept by law]; *Donovan* v *Mehlenbacher*, 652 F2d 228, 231 [records required to be kept by farmer employing migrant workers]; *Matter of Grand Jury Proceedings*, 601 F2d 162, 167-168, 170 [records required by regulations to be kept by custom-house broker]; cf. *Civil Aeronautics Bd.* v *United Airlines*, 542 F2d 394, 401-402 [records required to be kept by airline carrier]; *Securities and Exch. Comm.* v *Olsen*, 354 F2d 166, 170 [records re-

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[5] The constitutionality of the record keeping requirement itself has already been established (*Metropolitan Electronic Tel. Serv. Dealers Assn.* v *Guggenheimer*, NYLJ, July 2, 1975, p 12, Col 5, affd 51 AD2d 922, mot for lv to app den 39 NY2d 709, *supra*).

quired to be kept by investment advisors]; *Cooper's Express* v *Interstate Commerce Comm.*, 330 F2d 338, 340-341 [records required to be kept by interstate motor carrier]).

In short, statutory schemes requiring licensees to have books and records available for inspection during reasonable business hours are quite common (see, e.g., Alcoholic Beverage Control Law, § 105, subd 15; Insurance Law, §§ 24, 29, 526, 528; Public Healthy Law, § 3308; Vehicle and Traffic Law, § 415-a) and have long passed constitutional muster (e.g., *United States* v *Gordon*, 655 F2d 478; *United States ex rel. Terraciano* v *Montanye*, 493 F2d 682, cert den *sub nom. Terraciano* v *Smith*, 419 US 875; *Matter of McKaba* v *Board of Regents of Univ. of State of N.Y.*, 30 AD2d 495). There is "no meaningful distinction between an obligation to maintain records for inspection, and such an obligation supplemented by a requirement that those records be filed periodically with [governmental] officers * * * '[R]egulations permit records to be retained, rather than filed, largely for the convenience of the persons regulated' " (*Marchetti* v *United States*, 390 US 39, 56, n 14).

The authority to inspect records, which is at issue, is essentially an analogue of the power conferred upon an agency to issue a subpoena duces tecum. The Fourth Amendment is satisfied if the authority to inspect is exercised reasonably and if judicial review is available before a person is ultimately required to submit to an inspection (e.g. *Matter of Nicholson* v *State Comm. on Judicial Conduct*, 50 NY2d 597, 610-611; *Matter of A'Hearn* v *Committee on Unlawful Practice of Law of N.Y. County Lawyers Assn.*, 23 NY2d 916; *Civil Aeronautics Bd.* v *United Airlines*, 542 F2d 394, *supra;* cf. *United States* v *Morton Salt Co.*, 338 US 632; *Matter of Levin* v *Murawski*, 59 NY2d 35).

To be sure, there are limitations. "Unbridled" administrative discretion will not do (see *Donovan* v *Dewey*, 452 US 594, 599, *supra; Marshall* v *Barlow's Inc.*, 436 US 307, 323, *supra*). The propriety of a warrantless administrative inspection scheme is measured by a balancing of enforcement goals and needs against the privacy and regulatory guarantees within the statutory framework (*Marshall* v *Barlow's Inc., supra*). Inasmuch as the inspections here were limited to required records and the licensee's public areas, the statutory safeguards were sufficient to protect their legitimate privacy concerns (see, e.g., *United States ex rel. Terraciano* v *Montanye*, 493 F2d 682, *supra*).

Similarly, the "certainty and regularity" of the scheme's application is sufficiently tailored to goals and enforcement needs and thus "provides a constitutionally adequate substitute for a warrant" (*Donovan* v *Dewey*, 452 US 594, 603, *supra*). The legislative findings, to which we defer (*Donovan* v *Dewey, supra*, p 603), plainly support the need for surprise "if inspection is to be effective and serve as a credible deterrent" (*United States* v *Biswell*, 406 US 311, 316; see, also, *Marshall* v *Barlow's Inc., supra*, p 316). Parenthentically we note that discretion is limited through the use of a standard uniform checklist issued to inspectors, and the employment of a computerized random selection process.[6]

In this regard, we are not persuaded that an ex parte warrant or subpoena is a necessary condition precedent to an administative inspection. Since the administrative orders are not self-executing and may only be enforced with judi-

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[6] The inspectors do not seek evidence of a crime and their function is limited to insuring compliance with a civil regulatory scheme (cf. *People* v *Pace*, 101 AD2d 336).

cial assistance (Administrative Code, § 773-5.0), there is an adequate forum for the licensee to obtain judicial review of any constitutional claims prior to enforcement (cf. *Matter of Friedman* v *Hi-Li Manor Home for Adults*, 42 NY2d 408, 413). That is all that the Constitutional requires (see *Donovan* v *Dewey, supra*, pp 604-605).[7]

In fact, the administrative procedures under review provide more protection than a traditional search warrant, which is issued ex parte and is executed under the compulsion of the threat of force. No matter how intrusive the search may be, the individual at whom it is directed must comply. Under the procedures employed by the Commissioner of Consumer Affairs, once petitioners refused to comply, the commissioner's only recourse was to administrative and judicial process (cf. *Matter of Hynes* v *Moskowitz*, 44 NY2d 383, 394-395, app dsmd 439 US 921, *supra*).

In sum, the challenged provisions of the Administrative Code of the City of New York are not violative of the Fourth Amendment. Accordingly, the judgments should be reversed, with one bill of costs, the determinations of the Department of Consumer Affairs confirmed and the proceedings dismissed on the merits, and a declaration made that the challenged provisions of the Administrative Code are constitutional.

THOMPSON and RUBIN, JJ., concur.

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[7] We note that in January, 1982, the City Council enacted Local Law No. 5 of 1982, commonly referrel to as the "Padlock Law," which conferred additional enforcement powers on the Commissioner of Consumer Affairs, including the authority to enforce orders without judicial assistance (see Greenman, The Padlock Law, NYLJ, April 30, 1982, p 1, col 1). The question of whether the procedures authorized by the Padlock Law are constitutionally offensive is not now before us.

Dissenting Opinion of Appellate Division Justices Gibbons and Bracken

GIBBONS, J. (dissenting in part):

We are asked in this case to determine whether a municipality may require a person who is in the business of servicing televisions or radios to submit to an inspection of his business records without a warrant or its functional equivalent, e.g., an administrative subpoena. I believe that it may not, and, accordingly, would declare such an ordinance to be unconstitutional insofar as it purports to authorize such inspections. I therefore respectfully dissent in part.

In 1973, the City of New York enacted an ordinance (Administrative Code of City of New York, ch 32, tit B, art 44) which provides for the licensing and regulation by the Commissioner of Consumer Affairs (the commissioner) of persons engaged in the servicing of television, radio or audio equipment. The ordinance is designed to protect the public "from unethical and financially unstable service dealers" (Administrative Code, § B32-465.0). Besides setting forth a licensing procedure, the ordinance prescribes certain "Duties of Licensees", in pertinent part, as follows:

> "1. All work done by a service dealer shall be recorded on an invoice which shall contain the license number and such other detail as may be required by regulations promulgated by the commissioner. The invoice shall fully, separately and clearly describe all service work performed, all parts supplied, the date or dates thereof, and all charges made and computations thereof. One copy of the invoice shall be delivered to the customer and one copy shall be retained by the service dealer for a

period of at least three years from the date of such delivery

* * *

"3. The service dealer shall comply with regulations promulgated by the commissioner setting forth requirements for estimates or the making of such estimates and shall inform the customer as to the cost thereof prior to rendering same

* * *

"5. A service dealer shall maintain such additional records as are required by regulations adopted by the commissioner to carry out the provisions of the article. *Such records shall be open and available for reasonable inspection by the commissioner or other law enforcement officials, and shall be kept for a period of three years*" (Administrative Code, § B32-472.0, subds 1, 3, 5; emphasis supplied).

Pursuant to his power to implement and enforce the ordinance (Administrative Code, § B32-473.0), the commissioner has promulgated regulations requiring service dealers to give to each customer a written estimate, a work order, and a final bill. The regulations require that copies of these documents be retained for three years.

At the heart of this case is the provision in the ordinance, quoted above, that "records shall be open and available for reasonable inspection by the commissioner or other law enforcement officials, and shall be kept for a period of three years". A similar provision is found in section 773-13.0 (subd a) of the Administrative Code, pertaining to licensed businesses generally. It states that "[a]ll licensed * * * places of business shall be regularly inspected, and reports thereof shall be made to the commissioner". Also of rele-

vance is section B32-478.0 (subds 1, 2) of the Administrative Code, entitled "Powers and duties of the commissioner", stating:

> "1. *In addition to any other powers of the commissioner,* and not in limitation thereof, the commissioner shall have the power to enforce the provisions of this article, to investigate any violation thereof, *and to investigate the business, business practices* and *business methods of any person* who is or may be subject to this article, if in the opinion of the commissioner, such investigation is warranted. *Each person shall be obliged upon the request of the commissioner, to supply such information as may be required concerning the business, business practices or business methors or the proposed business practices or business methods.*
>
> "2. For the purpose of enforcing the provisions of this article and in conducting investigations relating to any violation thereof, and for the purpose of investigating the character, competence and integrity of any person who is or may be subject to this article, and the business, business practices and business methods thereof, *the commissioner, or commissioner's designee shall have the power to compel the attendance of witnesses and the production of books and records,* in accordance with the provisions of the civil practice law and rules. However, no information supplied by any person at the request of the commissioner concerning his business, business practices or business methods, or proposed business practices or methods shall be disclosed, except as may be necessary for the purpose of enforcing the provisions of this article" (emphasis supplied).

Dissenting Opinion—Appellate Division

In the event that a service dealer violates any provision of the ordinance or the regulations adopted thereunder, or fails "to comply with any order, demand, regulation or requirement made by the commissioner pursuant to the provisions of this article," the commissioner may impose a fine, or may deny renewal of, suspend, or revoke the dealer's license (Administrative Code, § B32-475.0, subds [h], [i]).

Glenwood TV, Inc. (Glenwood) and Charles TV, Inc. (Charles) are television and radio repair businesses located in Brooklyn, New York, and are licensed by the commissioner. On June 6, 1979, Glenwood was the subject of an inspection conducted by Joseph Laura, an employee of the New York City Department of Consumers Affairs (the department). After checking to see if the shop's license and certain required notices to customers were properly displayed, Laura asked to examine the records which the business was required to maintain over a three-year period. His request was refused. Similarly, on June 22, 1979, Inspector Laura was denied access to the records of Charles.

Subsequently, both licensees were charged by the commissioner with violating section B32-472.0 (subd 5) of the Administrative Code. After a joint hearing before a representative of the commissioner, each was fined $300 and was ordered "to make available for inspection all required records requested by the Department within five (5) days of the date of this order", or face "immediate suspension of the license(s)". After refusing to comply with this order and a subsequent order of suspension which threatened revocation, the licenses of both were revoked by the commissioner.

Glenwood and Charles then commenced suit in the form of parallel proceedings pursuant to CPLR article 78, and, in their petitions, requested, among other things, vacatur of the determination that they were guilty of violating sec-

tion B32-472.0 (subd 5), and reinstatement of their licenses. In support of their position, the petitioners set forth the following contentions: (1) that section B32-472.0 (subd 5) only requires service dealers to submit to "reasonable inspection", and Inspector Laura's inspections were not reasonable; (2) that Glenwood and Charles properly denied access of their records to Mr. Laura inasmuch as the Fourth Amendment of the United States Constitution prohibits compulsory administrative inspections of documents absent a warrant or subpoena; and (3) that the ordinance is unconstitutional inasmuch as it fails to prescribe standards to guide inspectors in its administration.

Special Term, in a decision dated June 1, 1981 (see *Matter of Glenwood TV* [*Ratner*], NYLJ, June 9, 1981, p 12, col 3), granted the relief requested 'in all respects". The court treated the proceedings as actions for declaratory judgment as well as proceedings brought pursuant to article 78. The court went on, in its decision, to declare that section B32-472.0 (subd 5) and 773-13.0 of the Administrative Code are "unconstitutional under the Fourth Amendment of the United States Constitution insofar as they purport to authorize non-consensual periodic inspections of radio and television repair shops without a search warrant". The court explicitly noted, however, that inspections could still be conducted under the ordinance provided that they were " 'reasonable' ", and opined that in order to be "reasonable" under the Fourth Amendment, an inspection "must be preceded by advance written notice, of at least one week". Further, "[i]f the owner or occupant insists on a search warrant, then the inspector must obtain a warrant before proceeding with the inspection".

The commissioner has appealed from the judgments entered subsequent to Special Term's decision. Interestingly,

while both judgments declare that sections B32-472.0 (subd 5) and 773-13.0 of the Administrative Code are unconstitutional insofar as they purport to authorize inspections without a search warrant, neither says anything about the need for advance written notice prior to such an inspection.

As a procedural matter, I believe that Special Term quite properly treated each of these law suits as a hybrid combination of a proceeding pursuant to CPLR article 78 and an action for a declaratory judgment (see *Matter of Kovarsky* v. *Housing & Devel. Admin. of City of N.Y.*, 31 NY2d 184, 191-192; *Kent's Lounge* v *City of New York*, —— AD2d —— [2d Dept., Aug. 13, 1984]; *Matter of Heimbach* v *Mills*, 54 AD2d 982). While the issue has not been pressed by the commissioner, I also believe that Special Term properly ruled that the constitutional issues raised by Glenwood and Charles were properly before it, notwithstanding their failure to litigate the same at the administrative level. The hearing officer lacked the requisite authority to rule on the question of the constitutionality of the inspections, such being a proper subject for the court to determine within the context of a declaratory judgment action or other appropriate judicial proceeding (*Watergate II Apts.* v *Buffalo Sewer Auth.*, 46 NY2d 52, 57-58; *Baddour* v *City of Long Beach*, 279 NY 167, 177; *Matter of Celestial Food Corp. of Coram* v *New York State Liq. Auth.*, 99 AD2d 25, 27, n).

I also agree with Special Term on the merits insofar as it concluded that a television or radio repair shop may not be compelled to produce its business records for inspection in the absence of a warrant or its functional equivalent, e.g., an administrative subpoena. However, I disagree with the further conclusion that a service dealer is entitled to advance notice of any such inspection.

Dissenting Opinion—Appellate Division

My analysis of this case begins with the Supreme Court's decisions in *Camara* v *Municipal Ct.* (387 US 523) and *See* v *City of Seattle* (387 US 541), for, in my view, the application of the constitutional principles found therein cannot be avoided. The Supreme Court in *Camara* applied the Fourth Amendment "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" to administrative inspections, and held that "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant" (*Camara* v *Municipal Ct., supra,* pp 528-529). At issue in *Camara* (*supra,* p 526), was the validity of an ordinance which allowed a building inspector " 'the right to enter, at reasonable times, any building' " in order to determine compliance with the city's housing code. Any person who prohibited such access was subject to criminal sanctions. Balancing the need for a warrantless search and the governmental purpose to be served against the invasion which such a search entailed, the court held that a warrant was required and that, absent an emergency, a person could properly withhold his consent to a search of his house where there was no warrant. Inspections for the purpose of enforcing a building code were not, therefore, held to fall within the "carefully defined classes of cases" which are exempt from the warrant requirement.

On the same day that it decided *Camara,* the Supreme Court also rendered its opinion in *See* v *City of Seattle* (387 US 541, *supra*) in which the court held that the Fourth Amendment and the principles set forth in *Camara* were applicable to businesses as well as residences. Specifically, the court held that "administrative entry, without consent, upon the portions of commercial premises which

[are] not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure" (*See* v *City of Seattle, supra,* p 545).

Thus, it appears to me that, unless some exception to the warrant requirement applies, *Camara* and *See* would require the issuance of a warrant or its functional equivalent to conduct the inspections sought by the commissioner of Glenwood's and Charles' business records.

The majority and the commissioner attempt to short-circuit an analysis of the issues at bar based on *Camara* principles by arguing that Glenwood and Charles have no legitimate expectation of privacy in the business records which they are required by law to keep. Remarking that these documents "are merely copies of original written estimates, work orders, and final bills that the service dealers gave their customers", the commissioner argues that the Fourth Amendment is inapplicable. Since the documents have already been made public, by giving the originals to customers, a service dealer allegedly does not retain any privacy interest in them. Reliance in this regard is placed on *United States* v *Miller* (425 US 435), in which the Supreme Court held that a depositor cannot complain on Fourth Amendment grounds when his bank turns over records of his checks and deposits to government agents.

In my view, *Miller* is distinguishable. If the issue at bar was the propriety of petitioners' customers turning over to appellant copies of the bills given to them by petitioners, then *Miller* would be squarely on point. However, individuals do not forfeit their expectation of privacy in an item merely because a third party has access to it. Letters provide a good analogy. Just because a letter has been sent to, and presumably read by, a third party does not mean that the writer/sender has given up his expectation of privacy in the copy retained by him.

The same contention being urged upon us by the commissioner was argued unsuccessfully by the Secretary of Labor in *Marshall* v *Barlow's, Inc.* (436 US 307), a case involving the authority of Congress to authorize warrantless inspections under the Occupational Safety and Health Act of 1970 (OSHA). The Secretary contended that since employees of a business have access to the so-called private areas of the business, OSHA investigators should also, since the exposure of these areas to the employees vitiated the employer's expectation of privacy therein. The Supreme Court retorted: "That an employee is free to report, and the Government is free to use, any evidence of noncompliance with OSHA that the employee observes, furnishes no justification for federal agents to enter a place of business from which the public is restricted and to conduct their own warrantless search" (*Marshall* v *Barlow's, Inc., supra,* p 315).

As for the further contention that the documents in question fall within the " 'required records' exception", the commissioner maintains that this exception stands for the proposition that "whatever minimal expectations of privacy television, radio and audio dealers may have in their business records generally, they can claim none in the copies they keep * * * which they are required by law to keep, subject to inspection". Both the commissioner and the majority cite to numerous cases in support of this position, but as the petitioners correctly point out, all of these cases "involved some form of * * * process", such as a subpoena or an injunction. What is involved in this case, however, is a demand to inspect business documents without any process, followed, eventually, by a fine and license revocation, without judicial sanction, when consent is refused. None of the cited cases allows for such a procedure (see, e.g., *California*

Bankers Assn. v *Shultz,* 416 US 21; *Interstate Commerce Comm.* v *Gould,* 629 F2d 847; *Matter of Hynes* v *Moskowitz,* 44 NY2d 383). Indeed, such a procedure is far different, conceptually, from a typical filing requirement (cf. *Marchetti* v *United States,* 390 US 39, 56, n 14).

Were I, nevertheless, to accept the position that the petitioners have no legitimate expectation of privacy in the records at issue, I would be forced to conclude that the principles of *Camara* (*supra*) generally have no application to inspections involving commercial documents. However, such a holding would, in my view, violate the letter and the spirit of the Fourth Amendment, which protects, among other things, the "right of the people to be secure in their * * * papers". If anything, the need to protect privacy interests in documents and other records is more vital than with other areas of Fourth Amendment concern. Thus, in discussing the functions a warrant should perform, the Supreme Court noted in *Marshall* v *Barlow's Inc.* (436 US 307, 324, n 22, *supra*) that "[d]elineating the scope of a search with some care is particularly important where documents are involved". And in *See* v *City of Seattle* (387 US 541, 544-545, *supra*), the court looked at its prior subpoena cases to derive its conclusion that warrantless inspections of commercial premises are presumptively improper. It noted that "when an administrative agency subpoenas corporate books or records, the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome" (see, also, *Myerson* v *Lentini Bros. Moving & Stor. Co.,* 33 NY2d 250; *Matter of Carvel Corp.* v *Lefkowitz,* 77 AD2d 872). Further, "while the demand to inspect may be issued by the agency, in the form of an administrative subpoena, it may not be

made and enforced by the inspector in the field, and the subpoenaed party may obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply" (*See* v *City of Seattle, supra,* pp 544-545; see *Matter of Hynes* v *Moskowitz,* 44 NY2d 383, 393, *supra*). With these principles in mind, the Supreme Court then concluded: "[W]e find untenable the proposition that the subpoena, which has been termed a 'constructive search' * * * is subject to Fourth Amendment limitations which do not apply to actual searches and inspections of commercial premises" (*See* v *City of Seattle, supra,* p 545). Reasoning in the opposite direction, I would conclude that, generally, absent a subpoena or consent, the same Fourth Amendment protections which apply to the nonpublic areas of commercial premises should also apply to the inspection of records conducted at a business site.

There is, of course, a recognized exception to the general rule that, absent consent or an emergency, an administrative search requires a warrant. Thus, in certain circumstances, industries which are "closely regulated" and "long subject to close supervision and inspection" or which are "pervasively regulated" can be subjected to warrantless inspections (*Colonnade Catering Corp.* v *United States,* 397 US 72, 74, 77; *United States* v *Biswell,* 406 US 311, 316). Industries involving firearms (*Biswell, supra*), liquor (*Colonnade, supra*), and the like, all come within the "carefully defined classes of cases" mentioned in *Camara* (*Marshall* v *Barlow's, Inc.,* 436 US 307, 313, *supra*), as the law presumes that "when an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulation", including the power to conduct warrantless searches, if authorized (*Marshall* v *Barlow's, Inc., supra,* p 113; *Sokolov* v *Village of*

Freeport, 52 NY2d 341, 346, n 1). However, more to the point than a presumption of consent, in such industries warrantless inspections may advance urgent governmental interests which outweigh the interest in privacy (*United States* v *Biswell, supra,* pp 315-317; *Colonnade Catering Corp.* v *United States, supra,* pp 76-77). Nonetheless, there is one caveat, for even when an industry is pervasively regulated or has a long history of close supervision, warrantless searches are not necessarily proper. The Legislature must still specifically authorize inspections without a warrant, and the regulatory inspection system must be "carefully limited in time, place, and scope" (*United States* v *Biswell, supra,* p 315; *Colonnade Catering Corp.* v *United States, supra,* p 77). As more recently expressed by the Supreme Court in a case involving the pervasively regulated mining industry, the Legislature must have "reasonably determined that warrantless searches are necessary to further a regulatory scheme and the * * * regulatory presence * * * [must be] sufficiently comprehensive and defined [so] that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes" (*Donovan* v *Dewey,* 452 US 594, 600).

Significantly, the commissioner does not attempt to show that the television and radio repair shop industry is closely regulated in the sense of the *Colonnade/Biswell* exception. Nor could he with any degree of persuasiveness. The only State statutes of which I am aware that regulate this business are sections 597 and 598 of the General Business Law, imposing fines on laundries, shoemakers, television and radio repair shops, and the like for not giving customers receipts on request when merchandise is left to be worked on. These sections are of relatively recent vintage, having

been passed in 1971. The New York City ordinance involved here, passed in 1973, is fairly rigorous. However, it is primarily confined to that aspect of the business which concerns honesty to patrons. Applying *Colonnade/Biswell* to this type of case would cause the exception to swallow the rule favoring warrants (see *Marshall* v *Barlow's, Inc.*, 436 US 307, 313, *supra*).

Nonetheless, the majority and the commissioner vigorously argue that the inspection system employed by the department, pursuant to which Inspector Laura visited Glenwood and Charles, is carefully designed, so that the abuses which allegedly concerned the court in *Camara, See* and *Marshall* are not present. Thus, according to the commissioner, "nothing can be gained through individualized review of the inspector's authority by a magistrate in advance of inspection". Reference is made to the hearing record, to the effect that the department has adopted a plan whereby service dealers are randomly chosen for inspection by computer. Once selected, the department's dispatch unit designates the employee who is to make the inspection. Inspectors do not have discretion as to which dealers they will visit, and it would be unusual for a service dealer to be subject to more than one inspection a year. A standard form is used to insure that inspections are conducted in a uniform manner, and it generally takes no longer than half an hour to complete an inspection, providing there are no interruptions.

Notably, petitioners dispute the effectiveness of this alleged plan. At the hearing, Glenwood's president testified that within the year prior to the hearing there had been four to six inspections, taking from one to two hours to complete. He stated that the resultant disruptions made it impossible to do business. A representative from Charles

testified to like effect. In any event, I disagree with the contention that an inspection plan devised by the department can serve as a substitute for the warrant requirement. How the department designs an inspection system or procedure does not affect the question of whether or not a warrant is needed, once it is concluded that the television and radio repair industry is not pervasively or closely regulated. That an inspection may be carefully limited in time, place and scope does not necessarily mean that it can proceed without prior judicial approval. Such is only the case when the industry involved is one of the *Colonnade/Biswell*-type, that is, is pervasively or closely regulated, and where the Legislature has reasonably determined that warrantless searches are necessary to monitor the industry (*Donovan* v *Dewey*, 452 US 594, *supra; United States* v *Biswell*, 406 US 311, *supra; Colonnade Catering Corp.* v *United States*, 397 US 72, *supra*). Absent affirmative findings as to these two requirements, statutory or regulatory safeguards cannot substitute for the individualized review imposed by a warrant procedure (*Camara* v *Municipal Court*, 387 US 523, 531-533, *supra*).

Thus, in the case of *Sokolov* v *Village of Freeport* (52 NY2d 341, *supra*), the municipality attempted to argue that procurement of a warrant was unnecessary because the limited nature of its mandatory inspections of prospective rental premises was so restricted as to render minimal any resulting intrusion. Our Court of Appeals, citing *Camara*, found that "there would nevertheless be a serious intrusion upon the interests of the owner deserving of constitutional protection" (*Sokolov* v *Village of Freeport, supra*, p 347). Similarly, in *Marshall* v *Barlow's, Inc.* (436 US 307, 315, *supra*), the Secretary of Labor argued that the restrictions placed on OSHA inspections obviated the need for a war-

rant. Furthermore, the Secretary of Labor maintained that the warrantless inspections were necessary to further the purposes of OSHA, a contention which is singularly missing in the commissioner's repertoire of arguments in this case. The Supreme Court disagreed with the Secretary of Labor. It noted that a warrant "would provide assurances from a neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria * * * Also, a warrant would then and there advise the owner of the scope and objects of the search, beyond which limits the inspector is not expected to proceed" (*Marshall* v *Barlow's, Inc., supra,* p 323).

The functions of a warrant procedure are indeed vital to the protection of our Fourth Amendment rights. As noted in *Marshall* (*supra*), one function is to inform the citizen. In nonpervasively regulated businesses, "when the inspector demands entry [sans warrant], the occupant has no way of knowing whether enforcement of the [ordinance] * * * involved requires inspection of his premises, no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself is acting under proper authorization" (*Camara* v *Municipal Court,* 387 US 523, 532, *supra*). Further, review by a neutral magistrate will tend to prevent abusive searches. No matter how circumscribed a regulatory inspection system is, without a warrant the citizen is subject to the discretion of the officer in the field. The system in this case presents a good illustration. There is no evidence in the record that, under the department's plan, inspections must occur at specified times. Further, while, generally, inspections only take half an hour or less, what would prevent an oppressive or vindictive inspector from taking all day, resulting in a tremendous disruption in business? Glenwood and Charles claim that

inspections sometimes can take up to one and a half to two hours to complete. Control over the scope of an inspection is particularly important where documents are involved (*Marshall* v. *Barlow's, Inc., supra,* p. 324, n 22). The documents in question must be retained for three years, and so far as the record shows, there is nothing to prevent an inspector from arbitrarily demanding to see, and then reading, every document going back the full three years. Done in the shop, perhaps on a busy afternoon, such an inspection could be very disruptive of business. While, in practice, this would probably happen rarely, it should not be left to the discretion of the employee in the field.

As already stated, an important function of a warrant is to assure the individual that there has been judicial consideration of the reasonableness of the inspection. Thus, it cannot be said that the imposition of a civil or criminal penalty for refusing to comply with an inspection demand supported by a warrant is unfair because of a lack of judicial involvement. A similar opportunity for judicial review, through a motion to quash, santifies the imposition of penalties when a person or business refuses to comply with a subpoena (*Donovan* v *Lone Steer,* —— US ——, 104 S Ct 769; *See* v *City of Seattle,* 387 US 541, 544-545, *supra*). For this reason, process by subpoena does not violate the Fourth Amendment, and a subpoena can serve as an analogue to a warrant to inspect records. In fact, the Supreme Court has held that, with administrative searches, an inspection is proper if supported by a warrant or its functional equivalent (*Marshall* v *Barlow's, Inc.,* 436 US 307, 325, n 23, *supra;* see, also, *Donovan* v *Dewey* 452 US 594, 604-605, *supra*). A subpoena with the concomitant right to judicial review, is just such an equivalent.

The commissioner maintains that his orders are not self executing and that an order or judgment from a court

is necessary to compel compliance. Therefore, according to both the commissioner and the majority, the petitioners have at their disposal sufficient judicial procedures to safeguard their constitutional rights. I disagree with both the premise and the conclusion. Whether or not the commissioner needs a judgment in order to execute on a fine, he still has the authority to suspend or revoke a license on his own (Administrative Code, §§ B32-475.0, 773-4.0, subd e). The only review possible is by way of a proceeding under CPLR article 78 or an action for a declaratory judgment. This is no more a substitute for a warrant requirement than was the writ of prohibition brought by the home owner in *Camara* v *Municipal Court* (387 US 523, *supra*). To be the functional equivalent of a warrant, judicial review in some form must, at least, be available *prior* to the imposition of any penalty for refusing to comply with an inspection demand and *prior* to any act of force which would compel a search despite protest (see *Marshall* v *Barlow's, Inc.*, *supra*, p 325, n 23; *See* v *City of Seattle*, *supra*, p 545; cf. *Matter of Hynes* v *Moskowitz*, 44 NY2d 383, *supra*).

While I would therefore conclude that Glenwood and Charles are entitled to the rescission of the fines imposed against them, reinstatement of their licenses, and a declaration that the ordinance is unconstitutional insofar as it purports to authorize an inspection of required records without a warrant or its functional equivalent, I would hasten to note that, as the Court of Appeals reminded us in *Sokolov* v *Village of Freeport* (52 NY2d 341, 348, *supra*), "the *Camera* opinion expressly provide[s] that the strict standards attending the issuance of a warrant in criminal cases are not applicable to the issuance of a warrant authorizing an administrative inspection". Thus, as the Supreme Court reiterated in *See* v *City of Seattle* (*supra*, p 545), [t]he agency's * * * demand for access [must] * * *

of course, be measured, in terms of [the] probable cause [necessary] to issue a warrant, against a flexible standard of reasonableness that takes into account the public need for effective enforcement of the particular regulation involved".

The need to effectively enforce the legitimate goals of the ordinance also compels me to disagree with Special Term's conclusion that a service dealer is entitled to one week's notice prior to an inspection. While the New York City Council could certainly add this requirement to the ordinance, or, alternatively, the commissioner might choose to promulgate such a regulation, the Constitution clearly does not require it. To the contrary, effective enforcement may require surprise inspections, albeit, supported by a warrant or its functional equivalent (*See* v *City of Seattle,* 387 US 541, 545, n 6, *supra;* see, also, *Marshall* v *Barlow's, Inc.,* 436 US 307, 316-320, *supra*). Moreover, I would not preempt warrantless inspections where a true emergency exists (*Sokolov* v *Village of Freeport, supra,* p 349; see *People* v *Calhoun,* 49 NY2d 398). While it is difficult in the case of business records to envision such an emergency, I am not prepared to say that such could never arise.

Accordingly, I would modify the judgments appealed from so as to declare that sections B32-472.0 (subd 5) and 773.13.0 of the Administrative Code of the City of New York are unconstitutional insofar as they purport to authorize nonconsensual periodic inspections of the records of television and radio repair businesses without a warrant or its functional equivalent, and, as so modified, affirm.*

BRACKEN, J., concurs.

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* *Metropolitan Electronic Tel. Serv. Dealers Assn.* v *Guggenheimer* (51 AD2d 922, mot for lv to app den 39 NY2d 709) is not to the contrary, as the court therein was never called upon to pass on this aspect of the ordinance.

Memorandum Decision of the Supreme Court of the State of New York County of Kings—Special Term

SUPREME COURT

KINGS COUNTY

(Special Term, Part I)

By JORDAN, J.

Dated June 1, 1981

Index No. 11704/1980

In the Matter of the Application of
GLENWOOD TV, INC.,

Petitioner,

vs.

BRUCE C. RATNER, as Commissioner of the Department of Consumer Affairs of the City of New York,

Respondent.

Index No. 11705/1980

In the Matter of the Application of
CHARLES TV, INC.,

Petitioner,

vs.

BRUCE C. RATNER, as Commissioner of the Department of Consumer Affairs of the City of New York,

Respondent.

In these two separate Article 78 proceedings, petitioners seek review and annulment of a determination of respon-

dent Department of Consumer Affairs (hereinafter sometimes referred to as Department) and reinstatement of their radio and television repair licenses. Since the facts in each proceeding are similar, the issues of law identical and the petitioners had been tried together at the administrative hearing and issued the joint determination now under review, the cases are consolidated herein for purposes of this decision.

The petitions now before the court are ripe for disposition at this time, there being no issues of fact requiring a trial of these proceedings. The underlying facts are as follows:

Both petitioners are radio and television repair businesses, having been licensed as such by the Department of Consumer Affairs in accordance with Article 44 ("Television, Radio and Audio Equipment Phonograph Service and Repairs") of Chapter 32 ("Department of Licenses") of the New York City Administrative Code (Vol. 4A Sections B32-465.0 *et seq*, page 51 *et seq*), specifically Sections B32-467.0 thereof. In June, 1979, on different dates, the business premises of the petitioners were visited during normal business hours by an inspector from the Department as part of its regular inspection program (not one based upon consumer complaints) for radio and television repair shops. The inspector had arrived without any prior notice and without a search warrant or subpoena. He asked to see the customer bills for the past three years. In each case, the petitioner, by its principal owner, refused to produce the bills. As a result of this refusal "to make available his records for a reasonable inspection by an inspector from the Department of Consumer Affairs", petitioners-licensees were separately charged with a violation of Sections B32-472.0 subdivision 5 of the New York City Administrative Code (Vol. 4A, page 515) and directed to appear at a

hearing on this charge. The statute allegedly violated reads in pertinent part as folows:

> "Sections B32-472.0 Duties of licensees.—
>
> 1. All word done by a service dealer shall be recorded on an invoice which shall contain the license number and such other detail as may be required by regulations promulgated by the commissioner. The invoice shall fully, separately and clearly describe all service work performed, all parts supplied, the date or dates thereof, and all charges made and computations thereof. One copy of the invoice shall be delivered to the customer and one copy shall be retained by the service dealer for a period of a least three years from the date of such delivery.
>
> * * * *
>
> 5. A service dealer shall maintain such additional records as are required by regulations adopted by the commissioner to carry out the provisions of this article. *Such records shall be open and available for reasonable inspection by the commissioner* or other law enforcement officials, and shall be kept for a period of three years." (emphasis supplied).

A hearing was held on November 13, 1979 before a hearing officer from the Department of Consumer Affairs. With the consent of all parties, the separate but similar charges against each petitioner were consolidated for purposes of the hearing. Both Glenwood and Charles TV were represented at the hearing by the same attorney, Solomon Jochnowitz, who also services as counsel to the Metropolitan Electronic Television Service Dealers Association (METSDA). Counsel stated at the hearing as a defense

to the charges (petitioners admitted that they refused to allow the inspector to see their bills) that in cases where there were no consumer complaints pending against the licensees, petitioners and other members of METSDA were advised not to give records to Department inspectors on the grounds that such inspections interrupt business and are unreasonable (see transcript of hearing pp 57-59).

In a written decision dated January 2, 1980, the hearing officer fined each petitioner $300 "for the failure to comply with a legitimate order of the Department of Consumer Affairs". He also ordered the petitioners "to make available for inspection all required records requested by this Department"; a failure to comply or pay the fine within 5 days "will result in the immediate suspension of the license(s)". In reaching this determination, the hearing officer set forth the following findings of fact and conclusions of law:

> "1. The respondents are licensed by the Department of Consumer Affairs under Article 44, Title B, Chapter 32 of the Administrative Code of the City of New York.
>
> 2. The Department of Consumer Affairs has been directed by the City Council to conduct periodic inspections of licensed businesses.
>
> 3. These inspections are reasonable in both frequency and duration. (The hearing officer apparently chose to rely on the testimony of the inspector and chief inspector that regular inspections are conducted approximately once a year and takes between 15 and 30 minutes.)
>
> 4. An inspector of the Department sought to conduct an inspection of each of the respondent's

businesses and requested certain records of each of the respondents.

5. The respondents refused to produce the records requested, which refusal, being on the advise of counsel was wilful.

6. Each of the respondents violated Sections B32-472.0(5) by their refusal to make available their records for a reasonable inspection by an inspector of the Department of Consumer Affairs."

The petitioners were notified of the hearing officer's decision in a letter dated January 15, 1980.

Petitioners failed to comply with either directive in the decision, as a consequence of which they received a notice dated February 20, 1980, advising each that its license was to be suspended March 5, 1980. In conjunction with the suspension, petitioners were directed to surrender their licenses within 10 business days after the date of suspension; failure to do so "will result in revocation of the license." Since petitioners did not comply, their respective licenses were revoked by the Department.

Thereafter, petitioners, by different counsel, filed for an administrative appeal of the hearing officer's decision. This appeal was denied "because it was not timely filed and because (it) raised no new issues of fact or law on appeal which were not adequately addressed at the hearing."

Petitioners then commenced the instant Article 78 proceedings seeking to overturn the Department's decision on the following grounds:

1. Petitioners were justified, by virtue of their Fourth Amendment rights under the United States Constitution against unreasonable search and seizure, in refusing to allow an inspection of their records without a search warrant.

2. Article 44 of the New York City Administrative Code (*supra*), enacted by the New York City Council as Local Law No. 74 of 1973, is unconstitutional in failing to prescribe standards in order to guide the Department and its inspectors in administering the law.

3. The determination by the Department was arbitrary and capricious and unreasonable.

In view of the constitutional issues raised by the petitioners, these matters shall be treated as hybrid proceedings for both Article 78 and declaratory relief (Matter of *Heimbach* v. *Mills*, 54 AD2d 982 (2d Dep't.)). Before examining the merits of these issues, the court must preliminarily dispose of two threshold defenses interposed by the respondents in their answers. The first of these, the statute of limitations, shall receive no further consideration since the court has been orally advised by respondent's counsel that this defense has been withdrawn.

The second of these defenses is the respondents' contention that petitioners have waived the opportunity to allege a violation of their constitutional rights in these proceedings by virtue of their failure to do so at the administratve hearing. The cases cited by the respondent for this proposition—*Matter of Leogrande* v. *State Liq. Auth.* (19 NY2d 418), *Matter of Gonzalez* v. *State Liq. Auth.* (30 NY2d 108), and *Matter of McKaba* v. *Board of Regents* (30 AD2d 495)—are inapposite in that the constitutional issues raised there relate solely to the admissibility of evdence. The suppression of evidence is not at issue in the instant proceedings but rather the unconstitutionality of a local statute and/or the matter in which it was enforced as against the petitioners are. These questions were not within the purview of the hearing officer at the administrative hearing but are properly before the court to decide (*Bad-*

dour v. *City of Long Branch,* 279 NY 167, 177; *Bevan* v. *New York State Teachers' Retirement System,* 74 Misc 2d 443, 446, mod on other grounds 44 AD2d 163). Accordingly, this defense is hereby dismissed.

Turning now to the merits of petitioners' constitutional arguments, the Fourth Amendment of the United States Constitution provides that, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated". In the landmark case of *Camara* v. *Municipal Court* (387 US 523) the United States Supreme Court overruled *Frank* v. *Maryland* (359 US 360) and extended this constitutional protection against "unreasonable searches and seizures" to administrative inspection programs of the type involved herein, concluding that:

> "except in certain carefully defined classes of cases a search of private property without proper consent is '*unreasonable*' unless it has been authorized by a valid search warrant" (emphasis supplied) (*Camara* v. *Municipal Court,* supra, pp 528-529; *See* v. *City of Seattle,* 387 US 541, 542-543; *Marshall* v. *Barlow's Inc.,* 436 US 307, 312; see also *Sokolov* v. *Village of Freeport,* —— NY2d ——, NYLJ 4/17/81, p 1, col 6, p 16, col 1).

In the *Camara* case, the appellant *Camara,* lessee of the ground floor of an apartment building, twice refused to allow a housing inspector access to a part of the leased premises used by *Camara* as a personal residence unless the inspector had a search warrant. He was thereafter arrested and charged with refusing to permit a lawful inspection in violation of the San Francisco Housing Code. Contending that the code section involved was uncon-

stitutional as being violative of the Fourth Amendment in that it authorzed municipal officials to enter a private dwelling without a search warrant, *Camara* sought a writ of prohibition against his criminal court trial. The Supreme Court agreed that *Camara* had a constitutional right to insist that the inspector obtain a search warrant and that he could not constitutionally be convicted for refusing to consent to the inspection without such a warrant (supra, 387 US at 540). The court said in summary:

> "we hold that administrative searches of the kind at issue here are significant intrusions upon the interests protected by the Fourth Amendment, that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual, and that the reasons put forth in *Frank* v. *Maryland* and in other cases for upholding these warrantless searches are insufficient to justify so substantial a weakening of the Fourth Amendment protections." (supra, p 534)

The warrant requirement of *Camara* was extended to administrative inspections of business premises in the companion case of *See* v. *City of Seattle,* supra (387 US 541, 543, 546), the court stating:

> "The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the

> field without official authority evidenced by a warrant." (supra, p 543)

See had refused to permit a fire inspector to enter and examine his locked commercial warehouse without a warrant. The inspection was conducted as part of a routine city-wide program to obtain compliance with the city's fire code. As a result of his refusal to allow the inspection, *See* was convicted and given a suspended fine of $100. The Supreme Court reversed the conviction, concluding that "appellant may not be prosecuted for exercising his constitutional right to insist that the fire inspector obtain a warrant auhorizing entry upon appellant's locked warehouse." (supra, p 546)

Following *Camara* and *See,* the Supreme Court carved out two exceptions from the search warrant requirement in administrative inspections:

1. Where the premises involve a "closely regulated industry" "long subject to close supervision and inspection" (*Colonnade Catering Corp.* v *United States,* 397 US 72, 74, 77 (liquor industry)); and

2. Where the premises involve a "pervasively regulated business" (*United States* v *Biswell,* 406 US 311, 316 (firearms)).

In its most recent incursion in the field of administrative inspections, the United States Supreme Court emphasized that *Colonnade* and *Biswell* "are indeed exceptions" and "represent responses to relatively unique circumstances" (*Marshall* v *Barlow's Inc.,* supra 436 US 307, 313). *Barlow's* involved the Occupational Safety and Health Act of 1970 (OSHA) and the right thereunder of an inspector from the Department of Labor to conduct a search of

business premises for safety hazards and OSHA violations without warrant, a search warrant not being expressly required under the Act (*Marshall* v *Barlow's Inc.*, supra, p 309). The Supreme Court, in refusing to expand the *Colonnade* and *Biswell* exceptions to this situation, held "that Barlow's was entitled to a declaratory judgment that the Act is unconstituional insofar as it purports to authorize inspections without warrant or its equivalent and to an injunction enjoining the Act's enforcement to that extent." (supra, p 325) In a footnote accompanying this holding, the court said that the injunction should not forbid the Secretary of the Department of Labor from exercising his inspection authority in a manner that satisfies the Fourth Amendment (supra, p 325 (footnote 23)).

Thus, as the law stands today, the Fourth Amendment proscription against "unreasonable searches and seizures" encompass administrative inpections of both residential and business premises. An inspection of these premises without a valid search warrant is per se "unreaonable" and therefore unconstitutional under the Fourth Amendment, and the occupant or owner of the premises may not be punished for refusing to consent to a warrantless inspection. A search warrant is not required for these limited exceptions:

1. Businesses which have long been subject to close regulation and supervision or which are pervasively regulated (*Colonnade Catering Corp.* v *United States*, supra, p 77; *United States* v *Biswell*, supra, p 316; *Marshall* v *Barlow's Inc.*, supra, p 313);

2. In emergency situations (*Camara* v *Municipal Court*, supra, p 539); or

3. Proper consent to the inspection without a warrant has been given by the occupant or owner of the premises

(*Camara* v *Municipal Court*, supra, pp 528-529; (*See* v *City of Seattle*, supra, p 545).

Relating these governing principles to the facts in the proceedings before this court, the respondent's attempted inspections without a warrant of the records of the petitioners and the subsequent revocation of their licenses can be sustained on Fourth Amendment constitutional grounds only if one of the enumerated exceptions is found to be applicable.

The court finds as a matter of law that petitioners' radio and television repair businesses by themselves or as part of the radio and television repair industry do not fall within the "certain carefully defined classes of cases" referenced in *Camara* (supra, p 528) and represented by the exceptions in *Colonnade* (liquor) and *Biswell* (firearms). Unlike the liquor industry, it cannot be said that the radio and television repair business has had a long history of regulation and close supervision and inspection. And unlike the firearms business, there has been no pervasive regulation in the manner and for the reasons described in *Biswell* (supra, pp 315-316). While radio and television repair businesses are now subject to statutory regulation (Article 44 of Chapter 32 of the New York City Administrative Code, supra, Vol 4A, Sections B32-465.0 *et seq*, p 51 *et seq*), this fact alone does not give rise to a *Colonnade* or *Biswell* exception. To do so would emasculate the governing principles espoused in *Camara* and *See* and reaffirmed in *Marshall* and the further caveat in *Marshall* "that the closely regulated industry of the type involved in *Colonnade* and *Biswell* is the exception" (Marshall v Barlow's Inc., supra, p 313).

The second enumerated exception, emergency situations, is not at issue here. The respondent does not allege any such emergency, nor could the routine periodic inspections

attempted here support any such contention. As the Supreme Court observed with respect to such inspections, "there is no compelling urgency to inspect at a particular time or on a particular day" (*Camara* v *Municipal Court,* supra, p 539).

This brings us to the last of the exceptions, consent. Quite obviously, the petitioners never expressly consented to the inspections sought herein since it was their refusal to grant such consent that gave rise to these proceedings. Nor may it be said that their consent to a warrantless administrative search is to be implied by virtue of the petitioners having elected to engage in a statutorily licensed and regulated business (*Sokolov* v *Village of Freeport,* supra, —— NY2d —— NYLJ 4/17/81 p 1 col 6, p 16 col 2 and f.n. 1). Since consent involves the waiver of a constitutionally protected right under the Fourth Amendment (*United States* v *Blalock,* 255 F Supp 268, 269), a consent sufficient to validate a warrantless search must have been given intelligently (i.e., with awareness of this Fourth Amendment right) and voluntarily (i.e., expressly agreed to without any duress or coercion) (*Wren* v *United States,* 353 F 2d 617, 618; *United States* v *Blalock,* supra, p 269). A statutorily implied consent in the instant proceedings could not be regarded as having been voluntarily given (*Sokolov* v *Village of Freeport,* supra, NYLJ p 16, col 2).

With none of the above-enumerated exceptions being applicable, the court must conclude that the respondent had no constitutional authority to conduct a warrantless inspection of the petitioners' premises or penalize the petitioners for their refusal to allow such inspection. Sections B32-472.0, subdivision 5, and 773-13.0 of the New York City Administrative Code (supra, Vol 4A, pp 515 and 377, respectively) are therefore unconstitutional insofar as they

purport to authorize periodic inspections of the type involved herein without a search warrant (*Marshall* v *Barlow's Inc.*, supra, p 325).

It is not necessary, however, to declare these sections unconstitutional on their face nor prohibit the Department from conducting "reasonable" inspections pursuant thereto in a manner that satisfies the Fourth Amendment (*Marshall* v *Barlow's Inc.*, supra, p 325 (f.n. 23)). In the court's opinion, the protection of the Fourth Amendment mandates that the Department of Consumer Affairs observe the following procedures in implementing its regular periodic administrative inspection program (not one based upon consumer complaints) for radio and television repair shops:

1. The inspection must be preceded by advance written notice, of at least one week, that an inspector from the Department will visit the business at a specific date and time, with an opportunity given to the owner or occupant of the premses to arrange prior to said date for a more convenient appointment. The notice shall also state the purpose of the inspection and a description of the things to be inspected. Finally, the notice shall advise the recipient of his constitutional right under the Fourth Amendment to insist upon a search warrant before any inspection is conducted, which right shall be exercised prior to the date of the inspection.

This requirement of prior notice is consistent with the basic purpose of the Fourth Amendment, which "is to safeguard the privacy and security of individuals against arbitrary invasions by government officials" (*Camara* v *Municipal Court*, supra, p 528). Allowing the inspector to "pop in" unannounced does not adequately safeguard the privacy of the business owner. The person whose premises or records are being inspected should have the right to have

this occur at a convenient time that does not interfere with his business; this problem is particularly acute for the one-man store. A surprise visit (i.e., without notice) can often occur at the most inopportune time and thus constitute an arbitrary intrusion. It is true, of course, that if the inspector comes without a search warrant, a consent to inspect could be withheld. However, reality may suggest that once an inspector is at the premises he will be allowed to carry on his inspection "because the occupant does not want to 'risk alienating the inspecting officer'." (*La Fave, Administrative Searches and the Fourth Amendment: The Camara and See Cases,* 1967 Supreme Court Review 1, 33-34).

Moreover, it is doubtful whether a consent given under these circumstances would be sufficiently voluntary so as to constitute an exception to the need for a search warrant. The Supreme Court has held that entry by officers to private premises under color of their office is "granted in submission to authority rather than an an understanding and intentional waiver of a constitutional right" (*Johnson* v *United States,* 333 US 10, 13).

Even a valid search warrant in this situation would still leave this important aspect of privacy unprotected—i.e., having the inspection at a convenient time—for a warrant is issued *ex parte* and would not prevent the inspector from making a surprise visit with the warrant (Note: *Administrative Search Warrants,* 58 Minnesota Law Review, 607, 643).

Consequently, the court regards prior notice as an essential step in preserving Fourth Amendment constitutional rights in the area of administrative inspections discussed herein (*State of Michigan* v *Tyler,* 436 US 499, 513-514 (J Stevens, Concurring Opinion); La Fave, supra, 1967 Supreme Court Review at pp 34-35; Note, supra, 58

Minnesota Law Review, at pp 643-644). In fact, since the notice must set forth the parameters of inspection in much the same manner as a search warrant, it may even be considered as more important in this context than the warrant.

2. If the owner or occupant insists on a search warrant, then the inspector must obtain a warrant before proceeding with the inspection. This insistence should occur either by phone or in writing prior to the scheduled date of inspection so that the inspector could come to the appointment armed with the warrant and avoid an unnecessary unannounced second visit. The warrant would be obtained ex parte and the strict probable cause standatrds attending the issuance of a warrant in criminal cases are not applicable (*Camara* v *Municipal Court*, supra, pp 538-539; *Marshall* v *Barlow's Inc.*, supra, pp 320-321; *Sokolov* v *Village of Freeport*, supra, NYLJ, p 16, col 3). Thus, specific knowledge of any statutory violation is not a prerequisite; mere demonstration of the need for periodic inspection should suffice for the issuance of the warrant (*Camara* v *Municipal Court*, supra, p 538; *Marshall* v *Barlow's Inc.*, supra, pp 520-521). A judge in passing upon a request for such a warrant need only determine whether there is an established periodic inspection program and whether the inspection for which authorization is sought is consonant with and a part of that program (La Fave, supra, 1967 Supreme Court Review at pp 24-25).

Consistent with the requirement of prior notice, the application for a search warrant itself should indicate, with factual details, that such notice has been given. The application and the warrant should also contain the parameters of the inspection, i.e., "particularly describing the place * * * or things to be (inspected)" (Fourth Amendment, United States Constitution).

Decision—Special Term

Accordingly, the decision of the court is as follows:

1. The Article 78 relief requested by the petitioners is granted in all respects. The charges against the petitioners that they violated Sections B32-472.0, subdivision 5, of the New York City Administrative Code (supra, Vol 4A, p 515), the determination of the respondent finding the petitioners guilty of these charges and the penalties imposed against the petitioners are annulled, and respondent is directed to reinstate the petitioners' radio and television repair licenses forthwith as of the date of this decision.

2. Declaratory judgment relief is granted to the extent that Sections B32-472.0, subdivision 5, and 773-13.0 of the New York City Administrative Code (supra, Vol 4A, pp 515 and 377, respectively) are declared unconstitutional under the Fourth Amendment of the United States Constitution insofar as they purport to authorize non-consensual periodic inspections of radio and television repair shops without a search warrant. To render these types of inspections constitutionally permissible, the Department of Consumer Affairs must observe and comply with the prior notice and search warrant procedures set forth above. Compliance is to commence as of the date of this decision.

Settle judgment.

/s/ ANTHONY T. JORDAN
J. S. C.

Judgment of the Supreme Court
of the State of New York
County of Kings—Special Term
In the Matter of the Application of
Glenwood T.V., Inc.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS

At a Special Term, Part I of the Supreme Court of the State of New York, County of Kings, held at the Courthouse thereof, Civic Center and Montague Street, Brooklyn, New York, on the 16th day of July, 1981.

PRESENT:

HON. ANTHONY T. JORDAN,
JUSTICE

Index No.: 11704/80

IN THE MATTER OF THE APPLICATION OF
GLENWOOD T.V., INC.,

Petitioner,

VS.

BRUCE C. RATNER, as Commissioner of The Department of Consumer Affairs of the City of New York,

Respondent

PROPOSED COUNTER-JUDGMENT

The Petitioner having instituted this proceeding pursuant to Article 78 of the Civil Practice Law and Rules by an Order to Show Cause dated June 11, 1980, for a judgment

directing respondent to reinstate petitioner's radio and television repair license and annulling respondent's determination finding petitioner guilty of violating Section B32-472.0 (5) of the Administrative Code of the City of New York and fining it $300.00, and respondent having answered, and the proceeding having duly come to be heard before this Court on September 27, 1980,

NOW, upon reading and filing the Order to Show Cause dated June 11, 1980, signed by Hon. JOHN A. MONTELEONE, Justice, the petition verified by Harold Pearlman on June 4, 1980 and the exhibits annexed thereto; and the Amended Answer verified by Paul G. Cooper on August 1, 1980, and the exhibits annexed thereto; and petitioner having appeared by MEISSNER, TISCH & KLEINBERG, Esqs., in support of the application, and the respondent having appeared by ALLEN G. SCHWARTZ, Corporation Counsel of the City of New York (JEAN BRANDON, Esq., of Counsel), in opposition to the petition; and due deliberation having been had thereon; and the Court having treated the instant proceeding as one seeking both Article 78 and declaratory relief; and the Court having made and filed its written decision dated June 1, 1981, it is

ORDERED AND ADJUDGED that the petitioner's application for a judgment directing respondent to reinstate petitioner's radio and television repair license, No. 737181, and annulling respondent's determination finding petitioner guilty of violating Section B32-472.0 (5) of the Administrative Code and fining it $300.00, be and the same is hereby granted in all respects, and it is further

ORDERED AND ADJUDGED that respondent reinstate petitioner's license forthwith, and it is further

Judgment—Special Term—Glenwood T.V.

ADJUDGED AND DECLARED that Sections B32-472.0 (5) and 773-13.0 of the Administrative Code of the City of New York are unconstitutional under the Fourth Amendment to the United States Consitution insofar as they purport to authorize nonconsensual periodic inspections of the records of T.V. and radio repair businesses without a search warrant.

ENTER:

s/ ANTHONY T. JORDAN
J. S. C.
S/ ANTHONY N. DURSO

Filed:

81 Jul 20 at 11:34

Judgment of the Supreme Court of the State of New York County of Kings—Special Term In the Matter of the Application of Charles T.V., Inc.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS

At a Special Term, Part I of the Supreme Court of the State of New York, County of Kings, held at the Courthouse thereof, Civic Center and Montague Street, Brooklyn, New York, on the July 17, 1981.

PRESENT:

HON. ANTHONY T. JORDAN,
JUSTICE

Index No: 11705/80

IN THE MATTER OF THE APPLICATION OF
CHARLES TV, INC.,

Petitioner,

vs.

BRUCE C. RATNER, as Commissioner of The Department of Consumer Affairs of the City of New York,

Respondent

PROPOSED COUNTER-JUDGMENT

The Petitioner having instituted this proceeding pursuant to Article 78 of the Civil Practice Law and Rules by an Order to Show Cause dated June 11, 1980, for a judgment

directing respondent to reinstate petitioner's radio and television repair license and annulling respondent's determination finding petitioner guilty of violating Section B32-472.0 (5) of the Administrative Code of the City of New York and fining it $300.00, and respondent having answered, and the proceeding having duly come to be heard before this Court on September 27, 1980,

NOW, upon reading and filing the Order to Show Cause dated June 11, 1980, signed by Hon. JOHN A. MONTELEONE, Justice, the petition verified by Ben Goldberg on June 4, 1980 and the exhibits annexed thereto; and the Amended Answer verified by Paul G. Cooper on August 1, 1980, and the exhibits annexed thereto; and petitioner having appeared by MEISSNER, TISCH & KLEINBERG, Esqs., in support of the application, and the respondent having appeared by ALLEN G. SCHWARTZ, Corporation Counsel of the City of New York (JEAN BRANDON, Esq., of Counsel), in opposition to the petition; and due deliberation having been had thereon; and the Court having treated the instant proceeding as one seeking both Article 78 and declaratory relief; and the Court having made and filed its written decision dated June 1, 1981, it is

ORDERED AND ADJUDGED that the petitioner's application for a judgment directing respondent to reinstate petitioner's radio and television repair license, No. 730085, and annulling respondent's determination finding petitioner guilty of violating Section B32-472.0 (5) of the Administrative Code and fining it $300.00, be and the same is hereby granted in all respects, and it is further

ORDERED AND ADJUDGED that respondent reinstate petitioner's license forthwith, and it is further

Judgment—Special Term—Charles T.V.

ADJUDGED AND DECLARED that Sections B32-472.0 (5) and 773-13.0 of the Administrative Code of the City of New York are unconstitutional under the Fourth Amendment to the United States Consitution insofar as they purport to authorize nonconsensual periodic inspections of the records of T.V. and radio repair businesses without a search warrant.

ENTER:

s/ A.T.J.
J. S. C.
S/ ANTHONY N. DURSO

Filed:

81 Jul 20 at 11:31

Decision of the Administrative Agency Following Hearing

THE CITY OF NEW YORK

[SEAL]

dated

DEPARTMENT OF CONSUMER AFFAIRS
80 Lafayette Street, New York, New York 10013

Telephone: 566-5408-9

BRUCE C. RATNER, *Commissioner*

To: Legal Dept.

From: Karen Miller

CASE NAME: Dept. vs. Charles TV Inc. & Glenwood TV Inc.
COMPLAINT NO: 152047 & 151698
LICENSE NO: 730085 & 737181
DATE OF DECISION: JAN 2 1980

A hearing on the above-captioned matters were held on November 13, 1979 before Hearing Officer Karen Miller.

Appearing:

Adrienne Collier, Esq.
Chief Inspector Chris Bossis
Inspector Joseph Laura, # 201
Solomon Jochnowitz, Esq.
Harold Pearlman, President, Glenwood T.V.
Charles Goldberg, President, Charles T.V.

With the consent of all parties, complaints # 151698 and 152047 were consolidated.

Both respondents were charged with violation of Section B32-472.0 subdivision 5 of the Administrative Code. Specifically, it is charged that on June 6, 1979, Glenwood TV Inc. and on June 22, 1979, Charles TV, Inc. refused to make available records for a reasonable inspection by an inspector from the Department of Consumer Affairs.

It must be noted that a hearing was held on August 29, 1979 on a complaint against Charles TV, Inc. The decision of the Department was that the original six (6) charged violations were to be dismissed and the matter was to be reset on a violation of B32-472.0 Subdivision 5. At the reset hearing date, counsel for respondent moved that the charge against Charles TV, Inc. be dismissed because the Inspector's report did not indicate violation of this section. The respondent did not appeal from the decision to reset this matter rendered after the August 29, 1979 hearing, nor did it vigorously contest the Department's jurisdiction to amend charges after giving proper notice. Respondent Charles' motion to dismiss is denied.

Mr. Jochnowitz also moved to dismiss the charges against both respondents on the ground that the Department did not move with due diligence. He cited a time lag of approximately four (4) months between the date of the inspection and the date of the notice of hearing. The Hearing Officer finds this delay not unreasonable. Motion to dismiss is denied.

Inspector Laura testified that he was assigned to conduct regular inspections at the premises of the respondents. On June 6, 1979, he visited Glenwood TV Inc., at which time his request to examine its records was refused. Mr. Perlman admitted that he refused to allow Inspector Laura to examine his bills.

On June 22, 1979, Inspector Laura appeared at Charles TV Inc., at which time his request to examine its records was refused.

Mr. Goldberg testified that his partner had refused to allow Inspector Laura access to the records of Charles TV, Inc.

Mr. Jochnowitz stated that in his capacity as counsel to the Metropolitan Electronic Television Service Dealers Association, he had advised the members of that association not to cooperate with the Department by allowing its inspectors access to the records of its licensees. He expressed an opinion that it was the Department's obligation to conduct reasonable inspections. He introduced testimony that inspections are conducted several times a year and take between one and two hours to complete.

Chief Inspector Bossis and Inspector Laura testified that regular inspections of each licensed business are conducted approximately once a year and take between fifteen and thirty minutes, unless the inspector is interrupted.

Mr. Jochnowitz argued that § 472.0(1) and 472.0(5) cannot be read together, but must be read separately. From this we infer that Mr. Jochnowitz takes the position that only those records other than invoices must be open and available for inspection under § 472.0(5), and that invoices need not be available for inspection as § 472.0(1) provides merely for the retention of invoces but contains no specific requirement for the production of invoices for inspection.

Mr. Jochnowitz further argues that "spot" inspections not only interfere with his clients' business, but are unnecessary in that the Department may subpoena whatever records it requires.

Section 773-13.0(a) of Title A, Chapter 32 of the Administrative Code specifically provides for the regular inspections of licensed businesses. The respondents, by their refusal to cooperate, prevented a regular inspection from being performed. Respondent's counsel has raised an interesting semantic point concerning § B32-472.0(1) and

§ B32-472.0(5). However, the legislative declaration enunciated in § B32-465.0, Article 44, Title B, Chapter 32, and also in § 773-1.0, Title A Chapter 32 of the Administrative Code of the City of New York, when read in conjunction with § 773-13.0(a) Title A, Chapter 32, compels a determination that the Commissioner, in being charged with the duty of protecting the public interest, is directed, not merely allowed, to conduct regular inspections. Although § B32-472.0(5) provides that certain records must be made available, it does not restrict the Commissioner to inspection of only those records. Further, it is reasonable to infer that § B32-472.0(1) which requires in part the maintenance of invoices for a period of three (3) years, requires that these invoices be available for inspection without the necessity of resorting to the Department's subpoena power.

After carefully considering the entire record, the Hearing Officer makes the following findings of fact and conclusions of law:

1. The respondents are licensed by the Department of Consumer Affairs under Article 44, Title B, Chapter 32 of the Administrative Code of the City of New York.

2. The Department of Consumer Affairs has been directed by the City Council to conduct periodic inspections of licensed businesses.

3. These inspections are reasonable in both frequency and duration.

4. An Inspector of the Department sought to conduct an inspection of each of the respondent's businesses and requested certain records of each of the respondents.

5. The respondents refused to produce the records requested, which refusal, being on the advice of counsel was willful.

6. Each of the respondents violated § B32-472.0(5) by their refusal to make available their records for a reasonable inspection by an inspector of the Department of Consumer Affairs.

DECISION

The licensees are ordered to make available for inspection all required records requested by this Department within five (5) days of the date of this order. Each licensee is fined $300.00 for the failure to comply with a legitimate order of the Department of Consumer Affairs. Payment must be remitted within five (5) days of the date of this order. Failure to comply with either part of this order will result in the immediate suspension of the license(s); which suspension will remain in effect until full compliance is achieved.

Approved: SHELLEY J SHERMAN
Shelley J. Sherman
Director of Adjudication

Notice of Appeal to the Supreme Court of the United States

COURT OF APPEALS

STATE OF NEW YORK

In the Matter of the Application of
GLENWOOD TV, INC.,

Petitioner-Appellant,

—against—

BRUCE C. RATNER, as Commissioner of the Department of Consumer Affairs of the City of New York,

Respondent-Appellee.

In the Matter of the Application of
CHARLES TV, INC.,

Petitioner-Appellant,

—against—

BRUCE C. RATNER, as Commissioner of the Department of Consumer Affairs of the City of New York,

Respondent-Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE is hereby given that GLENWOOD TV, INC., and CHARLES TV, INC., the above-named appellants in this consolidated appeal, hereby appeal to the Supreme Court of the United States from the final judgment of the Court of Appeals of the State of New York dated May 29, 1985, affirming the judgment of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department dated December 17, 1984, which declared that sec-

tions B32-742.0(5) and 773-13.0 of the Administrative Code of The City of New York were constitutional and thereby reversed the prior judgment of the Supreme Court of the State of New York, County of Kings, dated July 16, 1981.

This appeal is taken pursuant to Title 28, United States Code, section 1257, subdivision (2).

Dated: New York, New York
July 31, 1985

Meissner, Tisch & Kleinberg
Attorneys for Petitioners-Appellants
275 Madison Avenue
New York, New York
By: Richard A. Finkel

To:

Hon. Donald M. Sheraw
Clerk of the Court of Appeals
of the State of New York
Eagle Street
Albany, New York 12207

Hon. Anthony N. Durso
Clerk of the Supreme Court
of the State of New York,
County of Kings
and
County Clerk, Kings County
360 Adams Street
Brooklyn, New York 11201

Frederick A.O. Schwarz, Jr.
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New York, New York 10007

Certification

I, RICHARD A. FINKEL, an Attorney-at-Law, licensed to practice before the Courts of the State of New York and admitted to practice before the Supreme Court of the United States, hereby certify that on July 31, 1985, I caused a copy of this Notice of Appeal to be served upon:

FREDERICK A.O. SCHWARZ, JR.,
Corporation Counsel, City of New York
Attorney for Respondent-Appellee,
by regular mail to his regular place of business
at 100 Church Street, New York, N.Y. 10007.

HON. DONALD M. SHERAW, Clerk of the Court of Appeals of the State of New York, at the Courthouse located at Eagle Street, Albany, New York 12207

HON. ANTHONY N. DURSO, Clerk of the Supreme Court of the State of New York, County of Kings and County Clerk, Kings County at the Courthouse located at 360 Adams Street, Brooklyn, New York 11201.

s/ RICHARD A. FINKEL

Affidavit of Service by Mail

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

Helen Sheft, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at Flushing, New York.

That on the 31st day of July, 1985, deponent served the within Notice of Appeal upon Frederick A.O. Schwarz, Jr., Corporation Counsel, City of New York, attorney for Respondent-Appellee in this action at 100 Church Street, New York, New York 10007, the address designated by said attorney for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Service within the State of New York.

s/ HELEN SHEFT

Sworn to before me this 31st day of July, 1985

s/ ROSLYN PANTOCH
Notary Public
Commissioner of Deeds, City of N.Y.
No. 2-3678
Cert. Filed in New York County
Commission Expires July 1, 1986

Administrative Code of the City of New York
Chapter 32—Title A

CITY OF NEW YORK
DEPARTMENT OF CONSUMER AFFAIRS

ADMINISTRATIVE CODE OF THE CITY OF NEW YORK

CHAPTER 32

TITLE A

LICENSE ENFORCEMENT LAW OF 1973

§ 773-4.0. *Powers of the commissioner of consumer affairs with respect to licensing.*—a. The commissioner shall have cognizance and control of the granting, issuance, transferring, renewal, denial, revocation, suspension and cancellation of all licenses issued under this chapter and under all other laws conferring such powers upon him. The commissioner or the commissioner's designee shall collect all fees for all such licenses and permit and shall otherwise enforce the provisions of this chapter.

b. The commissioner shall, as he determines necessary and appropriate, promulgate, amend and rescind regulations and rules:

1. to carry out the powers and duties of the department;

2. to prevent and remedy fraud, misrepresentation, deceit and unconscionable dealing, and to promote fair trade practices by those engaging in licensed activities;

3. to require adequate disclosure by those engaging in licensed activities of both the terms and conditions under which they perform licensed ac-

tivities, adequate disclosure of the true names or true corporate names of licensees, and adequate disclosure of applicable local, state and federal law pertinent to consumers' interests regarding the conduct of activities licensed under this chapter;

4. to require the licensees keep such records as he may determine are necessary or useful for carrying out the purposes of the chapter and, except as specifically set forth in this chapter, retain them for three years;

5. to ensure that all persons and organizations licensed under this chapter have made appropriate financial disclosure, and that the premises complies with all legal requirements necessary to engage in the licensed activity;

6. with respect to licensed activities, to protect the health, safety, convenience and welfare of the general public; and

7. to ensure that those engaging in licensed activities do not discriminate against any person on the basis of age, sex, race, color, national origin, creed or religion in violation of city, state or federal laws.

* * *

d. The commissioner or the commissioner's designee shall be authorized to conduct investigations, to issue subpoenas, to receive evidence, to hear complaints regarding activities for which a license is or may be required, to take depositions on due notice, to serve interrogatories, to hold public and private hearings upon due notice, to take testimony and to promulgate, amend and modify procedures and practices governing such proceedings.

e. (1) The commissioner shall be authorized, upon due notice and hearing, to suspend, revoke or cancel any license issued by him in accordance with the provisions of this chapter and to impose or institute fines or civil penalties for the violation of (i) any of the provisions of this chapter and regulations and rules promulgated under this chapter and (ii) any of the provisions of any other law, rule or regulation, the enforcement of which is within the jurisdiction of the department including but not limited to title A of chapter sixty-four (the consumer protection law of nineteen hundred sixty-nine) title B of chapter sixty-four (the truth-in-pricing-law) and article twenty-eight of this chapter; provided that such violation is committed in the course of and is related to the conduct of the business, trade or occupation which is required to be licensed pursuant to this chapter. Except to the extent that dollar limits are otherwise specifically provided such fines or civil penalies shall not exceed five hundred dollars for each violation.

(2) The commissioner may arrange for the redress of injuries caused by such violations, and may otherwise provide for compliance with the provisions and purposes of this chapter.

(3) The commissioner or the commissioner's designee shall be authorized to suspend the license of any person pending payment of such fine or civil penalty or pending compliance with any other lawful order of the department.

(4) The commissioner shall be authorized to impose a fine or civil penalty or to suspend a license

or both for a failure to appear at a hearing at the department after due notice of such hearing. If a license has been suspended, it shall be returned to the department forthwith upon receipt of the order of suspension. Failure to surrender the license shall be grounds for a fine or civil penalty or revocation of the license.

(5) Any of the remedies provided for in this section shall be in addition to any other remedies provided under any other provision of law.

* * * *

§ 773-13.0. *Inspection; display of license.*—a. All licensed vehicles or places of business shall be regularly inspected, and reports thereof shall be made to the commissioner.

b. All licensees shall conspicuously post on their premises, licenses issued under this chapter and said licenses shall be accessible at all time for inspection by any interested person. Licensees having no fixed place of business shall exhibit their licenses upon the request of any intersted person.

Administrative Code of the City of New York
Chapter 32—Title B—Article 44

CITY OF NEW YORK
DEPARTMENT OF CONSUMER AFFAIRS

ADMINISTRATIVE CODE OF THE CITY OF NEW YORK

CHAPTER 32

TITLE B

ARTICLE 44

Television, Radio and Audio Equipment
Phonograph Service and Repairs

§ B32-472.0. *Duties of licensees.*—1. All work done by a service dealer shall be recorded on an invoice which shall contain the license number and such other detail as may be required by regulations promulgated by the commissioner. The invoice shall fully, separately and clearly describe all service work performed, all parts supplied, the date or dates thereof, and all charges made and the computations thereof. One copy of the invoice shall be delivered to the customer and one copy shall be retained by the service dealer for a period of at least three years from the date of such delivery.

2. The service dealer shall return all replaced parts to the customer, except such parts as may be exempted from this requirement by regulations of the commissioner and except such parts as the service dealer requires for return to the manufacturer or distributor under a warranty arrangement.

3. The service dealer shall comply with regulations promulgated by the commissioner setting forth requirements for estimates or the making of such estimates and shall

inform the customer as to the cost thereof prior to rendering same.

4. A service dealer shall not make the remuneration, salary, wage, or other compensation of any employee, partner, officer or member contingent or dependent upon, or in any manner determined by the value, price, quantity or type of parts replaced, upon any apparatus serviced or repaired by any person required to be licensed by this article.

5. A service dealer shall maintain such additional records as are required by regulations adopted by the commissioner to carry out the provisions of this article. Such records shall be open and available for reasonable inspection by the commissioner or other law enforcement officials, and shall be kept for a period of three years.

§ B32-475.0. *Revocation or suspension of license; fines.* —In addition to any powers of the commissioner, and not in limitation thereof, the license or permit of any person required to hold one pursuant to this article may be suspended, revoked or renewal thereof denied by the commissioner, and the licensee or permittee may be fined pursuant to section 773.4.0(e) of chapter 32 of the administrative code, upon a determination made by the commissioner or the commissioner's designee after due notice and hearing, that a licensee or permittee:

* * *

(h) has violated any of the provisions of this chapter, article or the regulations promulgated thereunder, or has knowingly caused, permitted, aided or abetted another in committing such violation;

(i) has failed to comply with any order, demand, regulation or requirement made by the commissioner pursuant to the provisions of this article.

Administrative Code—City of New York

§ B32-478.0. *Powers and duties of the commissioner.*—1. In addition to any other powers of the commissioner, and not in limitation thereof, the commissioner shall have the power to enforce the provisions of this article, to investigate any violation thereof, and to investigate the business, business practices and business methods of any person who is or may be subject to this article, if in the opinion of the commissioner, such investigation is warranted. Each person shall be obliged upon the request of the commissioner, to supply such information as may be required concerning the business, business practices or business methods or the proposed business practices or business methods.

2. For the purpose of enforcing the provisions of this article and in conducting investigations relating to any violation thereof, and for the purpose of investigating the character, competence and integrity of any person who is or may be subject to this article, and the business, business practices and business methods thereof, the commissioner, or commissioner's designee shall have the power to compel the attendance of witnesses and the production of books and records, in accordance with the provisions of the civil practice law and rules. However, no information supplied by any person at the request of the commissioner concerning his business, business practices or business methods, or proposed business practices or methods shall be disclosed, except as may be necessary for the purpose of enforcing the provisions of this article.

* * * *

Regulations—Department of Consumer Affairs of the City of New York

REGULATION 4—DISCLOSURES REQUIRED FOR REPAIRS MADE ON LICENSEE'S PREMISES.

1. *Definition.* For purposes of this Regulation, the term "Written Estimate" shall mean a signed writing containing:

a. a list of the parts to be replaced and the costs of the replacements, as well as a general description of the labor required for the repair and its total cost; and

b. a statement of the additional charges, if any, including any already incurred for the Written Estimate, pick-up and delivery, service call, storage, installation, the temporary loan of receiving apparatus or audio equipment during the repair of the customer's property, or any other extra charges, excluding tax; and

c. the estimated delivery date or range of delivery dates of the repair; and

d. a statement that the final cost (excluding tax) will not exceed the estimated cost by more than 20 per cent. If such statement is not provided, it shall be presumed that the final cost(excluding tax) will not exceed the estimated cost; and

e. the licensee's policy regarding warranties and guarantees on parts and labor, including:

(1) the licensee's warranties or guarantees given in connection with repairs, and

(2) any manufacturer's warranties or guarantees honored by the licensee with respect to the servicing performed; and

f. a brief description of the item's malfunction by the person or persons who diagnosed the repair.

2. *Work Order Required.* Any licensee or his or her employee who removes receiving apparatus or audio equipment from a home or accepts the same for repair at his or her place of business shall, before removing or taking custody thereof, furnish the customer or his or her agent with a legible copy of a Work Order, which shall also serve as a receipt, stating the following information:

a. the legal business identity, address, license number and telephone number of the principal licensee, as shown on the license issued by this Department;

b. the name and signature of the person who actually takes the receiving appartus or audio equipment into custody;

c. a description of the receiving appartus or audio equipment, including make, model and serial number, where available, or such other features as will reasonably identify the item accepted for repair;

d. the date the set was accepted for repair;

e. the name and address of the owner of the receiving apparatus or audio equipment;

f. a brief description by the customer of the item's malfunction;

g. the date or range of dates on which the customer is to receive a Written Estimate,if not already furnished;

h. a written schedule of charges, if any, for giving a Written Estimate, pick-up and delivery, service call, storage, installation, and the temporary loan of receiving apparatus or audio equipment during the repair of the customer's property, and any other charges; where a licensee's policy is to credit any of the above charges to the final cost of the repair, such credit shall be clearly indicated in computation of the Written Estimate; and

i. notice that "Pursuant to the Regulations of the Department of Consumer Affairs, your property is covered against loss by fire, theft or damage while in the custody of the service dealer."

3. *Written Estimate and Signed Authorization Required.* Prior to the commencement of work, a licensee must provide the customer or his or her agent with a Written Estimate and on the same document secure the customer or agent's signed authorization to repair at the Written Estimate price. The Work Order, Written Estimate, authorization and Final Bill may be included in the same document, so long as the information required by sections 1 and 2 of this Regulation and the provisions of Regulation 7 is included therein.

4. *Return of Unauthorized Repair.* If, after receiving the Written Estimate, the customer or his or her agent fails to authorize the repairs at the estimated cost, the equipment or apparatus shall be returned within five working days in substantially the same condition as when released to the licensee. In this case, the licensee shall be entitled to receive payment only for those items specified in section 2(h) of this Regulation which were actually provided and disclosed on the Work Order.

5. *Exemption from Requirement of Written Estimate.* Section 3 of this Regulation shall not apply and the Written Estimate of the total charges for repair may be verbally communicated to the customer if the licensee informs the customer of the customer's right to a Written Estimate, and if:

a. time and/or distance constraints make it impractical to deliver a Written Estimate and obtain a signed authorization before the date agreed upon for repairs to commence; and

b. oral agreement to proceed is reached with the customer before the actual repair is commenced and the licensee:

1. mails a copy of the Written Estimate to the customer before such repairs are commenced, and

2. a notation is made of the date, time, person receiving the authorization to commence, and the name of the person authorizing the repairs.

Once oral agreement is reached and the Written Estimate is mailed, the licensee need not wait for the customer to receive the mailed Written Estimate or return a written consent before commencing repairs.

6. *Charges in excess of Estimate.*

a. Total charges (excluding tax) for repairs made shall not exceed the original estimate or any subsequent estimate by more than 20 per cent, without the previous written or oral consent of the customer. Such consent may be communicated

orally, provided that a notation is made of the date, time, person receiving such consent, and the name of the person authorizing the additional repairs and the licensee mails a copy of the written estimate to the customer before such repairs are commenced.

b. When the final total charges (excluding tax) exceed the estimate by more than 20 per cent and the customer does not authorize the increased cost estimate, the licensee must reassemble the item and return same within five working days, without charging the customer a sum in excess of repairs completed and authorized in the Written Estimate.

7. *Exemption.* Repairs made pursuant to an agreement between the customer and the service dealer that, for a fixed fee and for a specified time of at least nine months, receiving apparatus or audio equipment will be maintained and/or repaired without additional charge, are exempted from all of the provisions of this Regulation, except subsections (a) through (f) and (h) and (i) of section 2, but only to the extent of those repairs covered by such agreement.

REGUATION 5—DISCLOSURE REQUIRED FOR REPAIRS MADE IN THE CUSTOMER'S HOME.

1. *Estimate and Authorization Required.* Every licensee who makes a repair in the customer's home shall not commence work without:

a. informing the customer of his or her right to request a Written Estimate and, if there is a charge for a Written Estimate, the amount of such charge; and

b. furnishing the customer or his or her agent with an estimate, which shall be in writing if the customer so requests and which conforms in substance to the requirements of a Written Estimate, as defined in Regulation 4, section 1, subsections (a), (b), (d), (e), and (f); and

c. obtaining the customer [1] or his or her agent's signed authorization to proceed with repairs, except that such authorization may be orally communicated under the circumstances and in the manner specified in Regulation 4, sections 5 and 6.

2. *Final Bill Required.* Every licensee who makes a repair in the customer's home shall not collect a fee for repair unless the licensee has first delivered a Final Bill, as defined in Regulation 7, to the customer or his or her agent. If neither the customer nor his or her agent is present, the Final Bill shall be left at the customer's premises. The estimate, authorization and Final Bill may be contained in the same document, so long as the information required by sections 1 and 2 of this Regulation is included therein.

3. *Charges in excess of Estimate.* The total charges (excluding tax) for repairs shall not exceed the original estimate by more than 20 per cent, without licensee first receiving the customer's written or oral consent to proceed with repairs, as provided by Regulation 4, section 6. When the customer does not authorize the increase cost estimate, the licensee must reassemble the item, in which case the licensee shall receive payment for only those repairs and

[1] So in original; "customer's" probably intended.

costs which were authorized and completed, and only to the extent of the price provided in the estimate.

4. *Disclosure of Service Call Charge.* A licensee who charges for a service call separately from the costs of repair shall fully disclose these policies prior to making a service call. If the charge for a service call is not a fixed, but a variable amount, a licensee must also disclose the applicable method of computation. Failure to make such disclosures shall be deemed to be an untrue and misleading practice.

REGULATION 7—FINAL BILL REQUIRED.

1. A licensee shall give a legible copy of the Final Bill, together with the repaired item, to every customer.

2. A Final Bill shall mean a writing containing:

a. the date of the Final Bill;

b. the true legal identity, business address and license number of the service dealer, as shown on the license issued by this Department;

c. the name and address of the customer;

d. a description of the item serviced, including make, model and serial number, where available, or such other features as will reasonably identify the item left for repair;

e. the complete and legible signature of the licensee or his or her agent, or in cases where service is performed and completed in the customer's home, the signature of the licensee's agent who performed the service; and

f. a statement of total charges.

3. The statement of total charges shall include:

a. an itemized list and description of parts replaced, which must:

(i) include a description by make, model and serial number or by class and type of each part, where available, or such other description as will reasonably identify each part; and

(ii) state if a part is used, rebuilt or reconditioned, provided however that if a picture tube is installed, the description of such replacement tube shall conform to the requirements provided by Regulation 10; and

(iii) state the charge for each part replaced; and

(iv) not contain miscellaneous charges such as "shop materials" or "shop supplies," or other similar all-inclusive phrases, which exceed $3.00; and

(v) state if any part was replaced under a warranty or guarantee arrangement or for "no charge"; and

(vi) state the licensee's policy regarding warranties and guarantees on parts and labor, including:

(a) the licensee's warranties or guarantees given in connection with repairs, and

(b) warranties and guarantees honored by the licensee.

b. a statement or description of the labor or technical services performed for which a charge was imposed, which shall include:

(i) the total cost for such labor; and

(ii) if time is relevant to the computation of labor charges, the total time spent on repair and the labor rate per hour; or

(iii) any other basis used for computation and a description of the applicable method of computation.

c. a statement of any additional charges, if any, for the Written Estimate, pick-up and delivery, service call, storage, installation and any other charges.

REGULATION 8—COPIES OF DOCUMENTS.

1. A licensee must immediately give each customer a copy of every document which the customer has signed and every document required by Regulations 4, 5 and 7.

2. A licensee must retain for a period of at least three (3) years, an original or a legible copy of all documents required by these regulations.

BEST AVAILABLE COPY

85-330

No. _____

Supreme Court, U.S.
FILED
SEP 27 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

In the Matter of
GLENWOOD T.V., INC., a Corporation,
Appellant,
vs.
BRUCE C. RATNER, as Commissioner
of Consumer Affairs
of the City of New York,
Appellee.

In the Matter of
CHARLES T.V., INC., a Corporation,
Appellant,
vs.
BRUCE C. RATNER, as Commissioner
of Consumer Affairs
of the City of New York,
Appellee.

BEST AVAILABLE COPY

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

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50 pp

EDITOR'S NOTE

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Preliminary Statement

Pursuant to Rule 16.1 of the Rules of this Court, the appellee moves that the appeal be dismissed, or in the alternative that the judgment of the Court of Appeals be affirmed.

Statement of the Case

In 1973, the New York City Council responded to a pattern of deceptive and unconscionable trade practices by radio and television service dealers by enacting an ordinance which requires dealers in the City to be licensed and to make full and fair disclosures to their customers. Licensees must, among other

things, prepare written estimates in advance of the costs of the work they propose to do, obtain signed orders for any work, and give their customers itemized final bills. Licensees are required to keep records reflecting their compliance with these mandates, which records must be "open and available for reasonable inspection by the Commissioner [of Consumer Affairs] or other law enforcement officials." New York City Administrative Code, ch. 32, tit. B, art. 44, Sec. B32 - 472.0(5).

The Council has also directed the Commissioner of Consumer Affairs to conduct periodic inspections to insure that licensees comply with the terms of their licenses and government regulations. New York City Administrative Code Sec. 773-13.0. Pursuant to this direction, the Commmissioner conducts spot checks of

each licensee about once a year. The scope of the inspections is limited to verifying that a dealer's license and other required notices are conspicuously posted in the public areas of their shops, and to examining a sample of the records which they are required to keep.

The Commissioner chooses the dealers to be inspected on any given day randomly by computer, and then designates the inspector to make the inspection. No inspector has discretion as to which dealer to inspect, and a standard form is used to insure that inspections are conducted in a uniform manner. Dealers are not notified in advance of when they will be inspected. The inspections ordinarily take 15-30 minutes to complete, but sometimes longer because inspectors will interrupt inspections to allow dealers to wait on customers. No

inspector is authorized to enter any part of a dealer's premises which is not open to the general public without the consent of the proprietor, and no search is made of the premises to locate any records. Dealers are simply asked to produce the records they are required to keep at the time of the inspection.

In 1979, the Department attempted spot checks of the two appellants. In both instances, the inspector checked to see that the dealer's license and other notices were conspicuously posted (they were), and then asked to see a sample of the estimates, work orders, and final bills they were required to keep. In both instances, the inspector's request was refused.

Administrative charges were filed against both appellees, and, following a hearing both were found guilty of

of willfully and unreasonably refusing to produce the requested records. Each licensee was fined $300 and ordered to make the records available for inspectors within five days of receiving notice of the hearing officer's decision. When they failed to comply, they were informed that their licenses would be suspended. When they further refused to surrender their licenses and cease operation pursuant to the notice of suspension, the Department revoked their licenses.

Appellees then commenced proceedings in the Supreme Court of the State of New York to review the administrative determinations, claiming, among other things, that the local legislation authorizing the inspections violated their Fourth Amendment rights.

Summary of Argument

This appeal does not present a substantial federal question. The issue is not, as appellants assert, whether the Commissioner of Consumer Affairs can lawfully conduct warrantless, non-consensual inspections of the commercial premises and property of licensed radio and television service dealers, but rather whether he can require dealers to produce for an inspector making a spot check certain business records the dealers are required by law to keep and make available for inspection. Statutory schemes that require businesses to keep records and file them periodically with regulatory agencies are commonplace and have long been viewed as constitutional. So too, is the statutory scheme at issue here. The statute does not become

constitutionally infirm because it permits the dealers to retain, rather than file, the records they are required to keep and display them to inspectors. The Commissioner in no way infringed the appellants' rights by penalyzing them for willfully refusing a request that they produce the records for a reasonable inspection.

Moreover, in upholding the constitutionality of the local legislation which authorized the inspections which appellants challenge, the New York Court of Appeals fully considered and applied the principles of Fourth Amendment jurisprudence found in this Court's numerous decisions. See Glenwood T.V., Inc. v. Ratner, 65 N.Y.2d 642, __ N.Y.S.2d __, ___ N.E.2d __ (1985), aff'g 103 A.D.2d 322, 480 N.Y.S.2d 98 (2d Dept. 1984). It upheld the legislation for the reasons

elaborated in the lengthy majority opinion of the Appellate Division (Titone, J.). That court stressed, as has this Court, that "analysis of any search and seizure claim, and correspondingly the Fourth Amendment's warrant clause, must begin with a threshhold determination of whether the subject of the search possess a reasonable expectation of privacy in the area or items searched" (13a). It found that the licensees could have no complaint about the presence of the inspectors in their shops because they have no reasonable expectation of privacy in the public areas of a commercial establishment, and that the warrant clause has long been deemed inapplicable to the records that businessmen are required by law to keep in compliance with regulatory require-ments. "In short, statutory schemes

requiring licensees to have books and records available during reasonable business hours are quite common . . . and have long passed constitutional muster...." (15a).

Moreover, the Appellate Division found that the authority to inspect the records is essentially an analogue of the power conferred upon an agency to issue a subpoena duces tecum, and satisfied the Fourth Amendment requirements applicable to such subpoenas. It ruled that the legislation by limiting the discretion of the inspectors in the field, and by limiting the scope of the inspections to required records and the licensees' public areas, was sufficient to protect the licensees' legitimate privacy interests, and stressed that judicial review is available ultimately before a

person can be required to submit to an inspection. "In fact, the administrative procedures under review provide more protection than a traditional search warrant, which is issued ex parte and is executed under the compulsion of the threat of force." (17a).

Argument

I. Introduction

It is well settled that the Fourth Amendment protects people, not places, Terry v. Ohio, 392 U.S. 1, 9 (1968); Katz v. United States, 389 U.S. 347, 351 (1967), and the purpose of the Fourth Amendment is to protect people from arbitrary and oppressive governmental conduct. Michigan v. Tyler, 436 U.S. 499, 504 (1978); United States v. Chadwick, 433 U.S. 1, 7 (1977). Thus, the Fourth Amendment vests individuals

with the right to be free from "unreasonable governmental intrusions into their legitimate expectations of privacy." Chadwick, 433 U.S. at 7; see also Bell v. Wolfish, 441 U.S. 520, 558 (1979); Terry, 392 U.S. at 9.

The Fourth Amendment prohibits only unreasonable searches, Carroll v. United States, 267 U.S. 132, 147 (1925). To determine reasonableness, the Court balances the intrusiveness of the search on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests. Illinois v. Lafayette, 103 S. Ct. 2605, 2608 (1983); United States v. Villamonte-Marquez, 103 S. Ct. 2573, 2579 (1983); Delaware v. Prouse, 440 U.S. 648, 654 (1979); see also United States v. Martinez-Fuerte, 428 U.S. 543, 555 (1976); Terry, 392 U.S. at 20-21.

In the present case, the City Council has determined that certain records must be kept by licensed radio and television service dealers reflecting their compliance with their obligations as licensees to make full and fair disclosures to consumers, and that these records be "open and available for reasonable inspection" in order to permit effective enforcement of the law. See United States v. Biswell, 406 U.S. 311, 316 (1972) ("unannounced, even frequent inspections" of businesses may be essential "if inspection is to be effective and serve as a credible deterrent"). Appellants for their part have no Fourth Amendment interest at stake in the records and no other legitimate interest to put into the balance, which is not adequately protected by the statute itself and by

the availability of judicial review to protect against mistaken or arbitrary inspection orders. Thus, as we will show below, the inspections at issue satisfy the Fourth Amendment's central requirement of reasonableness. Donovan v. Dewey, 452 U.S. 594, 600, 603, 605 (1981).

II. The Appellants Have No Legitimate Expectation of Privacy In Business Records That They Are Required By Law to Maintain and Make Available to City Inspectors

The application of the Fourth Amendment depends in the first instance on whether the person invoking its protection can establish a legitimate expectation of privacy in the area or items the government would search. Rakas v. Illinois, 439 U.S. 128, 143 (1978); Terry v. Ohio, 392 U.S. 1, 9 (1968); Katz v. United States, 389 U.S. 347, 351

(1967). In Donovan v. Dewey, 452 U.S. 594 (1981), the Court stated (at 598-500):

> "unlike searches of private homes, which specifically must be conducted pursuant to a warrant in order to be reasonable under the Fourth Amendment, legislative schemes authorizing warrantless administrative searches of commercial property do not necessarily violate the Fourth Amendment . . . . The greater latitude to conduct warrantless inspections of commercial property reflects the fact that the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home."

Accordingly, it is critical to decide what, if any, legitimate expectation of privacy the appellants have in the records the Commissioner sought to inspect. These records comprise copies of written estimates, work orders, and final bills provided by service dealers to their customers. There is nothing intrinsically private about them. The

information they contain does not "touch upon the intimate areas of an individual's personal affairs" or reveal anything about a dealer's "activities, associations, or beliefs." California Bankers Ass'n. v. Schultz, 416 U.S. 21, 78-79 (1974) (Powell, J., concurring). They are business records of the kind that have generally been accorded minimal Fourth Amendment protection. United States v. Morton Salt Co., 338 U.S. 632, 651-653 (1950); see, "Developments in the Law - Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions," 92 Harv. L. Rev. 1227, 1286-1289 (1979). In Interstate Commerce Com. v. Gould, 629 F.2d 847, 858 (3rd Cir. 1980), cert. denied, 449 U.S. 1077 (1981), the Circuit Court observed that "the modern businessman has little or no expectation of privacy in his business

records, especially those documents prepared in compliance with regulatory requirements."

Even allowing that some minimal expectation of privacy might exist, the licensee's interest in the records is not sufficiently strong to require a judicial determination that probable cause exist before government can inspect them. In United States v. Miller, 425 U.S. 435, 442 (1976), the Court held that a bank's depositors enjoy no legitimate expectation of privacy in their personal checks and bank records, since the information they contain is conveyed to the bank and exposed to its employees in the ordinary course of business. Similarly, in Couch v. United States, 409 U.S. 322, 335-336 & n.19 (1973), the Court held that the sole proprietress of a restaurant had no legitimate

expectation of privacy in her bank statements, payroll records, and reports of sales, when she turns them over to her accountant for the purpose of preparing her income tax returns, knowing that mandatory disclosure of the information in them is required in the returns. In Bellis v. United States, 417 U.S. 85, 91-91 (1974), the Court held that a lawyer had no legitimate expectation of privacy in the financial records which he shares with his partners in a law firm. In each of these cases, the individuals involved undoubtedly believed that the records were confidential and private, but this Court refused to recognize their subjective expectations as legitimate. The principles of these cases compel the conclusion that the appellants in this case could not have an expectation of privacy sufficient to trigger the Fourth

Amendment's probable cause requirement.

In fact, in the case at hand there is far less reason for judicial concern than there was in Miller, Couch, and Bellis. The radio and television service dealers can have no legitimate expectation of privacy in records that they are specifically required by law to keep and make available for inspection pursuant to the licensing law. Involved here is the "required records" exception, which has a firm place in the history of the law of searches and seizures, being traceable in the first instance to the seminal decision of Boyd v. United States, 116 U.S. 616, 623-624 (1886), and reiterated in subsequent decisions of the Court. E.g., Shapiro v. United States, 335 U.S. 1, 32-34 (1948); Wilson v. United States, 221 U.S. 361, 374-375, 380 (1911);

Hale v. Henkel, 201 U.S. 43, 77 (1906).* The doctrine was well stated in United States v. Pine Valley Poultry Corp., 187 F. Supp. 455 (S.D.N.Y. 1960), a case in which the District Court denied a motion to suppress evidence that was secured by inspectors of the Department of Agriculture from an examination of records that poultry dealers were

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*In Camara v. Municipal Court, 387 U.S. 523 (1967) and subsequent decisions, the Court dealt with administrative searches of residences and of the non-public portions of business premises. The only reference in the decisions to administrative inspections of records is contained in a single footnote to Marshall v. Barlow's, Inc., 436 U.S. 305, 324 n.22 (1978), and there the Court was responding to a claim by the Secretary of Labor of authority to examine not only the records the company was required to keep by law, but also all other records, files and papers bearing on the company's compliance with health and safety regulations. The Court answered simply: "[A]n inspection of documents of this

(footnote contined on next page)

required by law to keep, subject to inspection at reasonable times. There, Judge Weinfeld wrote:

> The power of Congress to require those engaged in a business affected with a public interest to keep records subject to inspection by an administrator in order to secure enforcement of the law is not open to constitutional objection. Thus, the books and records, so kept are not private papers or records, but assume the characteristics of public or quasi-public documents, a distinction recognized by the law. In a sense, such "required records" are in the public domain. As a result, they are nonprivileged and their custodian is not afforded the traditional protections of the fourth and fifth amendments; rather, in assuming their custody, he has accepted the incident obligation to permit inspection.

(footnote continued from previous page)

scope may [not] be effected without a warrant" (id). That statement cannot be read as implying disapproval of warrantless inspections that are carefully limited to specific documents required to be kept by law, or any reconsideration of the doctrine of "required records." See California Bankers Ass'n v. Schultz, 416 U.S. 21, 52-55, 59-72 (1974) (sustaining constitutionality of record keeping and compulsory reporting provisions of Bank Secrecy Act).

The rule excepting "required records" from the category of unreasonable searches and seizures embodies a long-held understanding that businesses can have no legitimate expectations of privacy in the records they are required by law to keep, subject to inspection. The fact that records are "required records" is decisive of any privacy claim. United States v. Snyder, 668 F.2d 686, 690 (2d Cir. 1982) (union officials have no expectation of privacy in records of union pension and welfare fund required to be kept by law); In Re Grand Jury Proceedings, 601 F.2d 162, 167-168, 170 (5th Cir. 1979) (licensed customshouse broker has no expectation of privacy in records required by regulations to be kept); Youghiogheny and Ohio Coal Co. v. Morton, 364 F. Supp. 45, 41 n. 5 (S.D. Ohio 1973) (mine operator

has no expectation of privacy in the maps, books and records required by the Mine Safety Act); Hosto v. Brickwell, 265 Ark. 147, 577 S.W. 2d 401 (1979) (licensed pharmacist has no expectation of privacy in records required by law to be kept).

Thus numerous courts have upheld in a wide variety of circumstances statutes requiring licensees to keep records and to make them available for inspection without the necessity of a judicial warrant. E.g., Donovan v. Mehlenbacher, 652 F.2d 228, 231 (1st Cir. 1981) (records required to be kept by farmer employing migrant workers); Civil Aeronautics Board v. United Airlines, Inc., 542 F.2d 394 (7th Cir. 1976) (records required to be kept by airline carrier); Securities and Exchange Com. v. Olsen, 354 F.2d 166 (2d Cir. 1965)

(records required to be kept by investment advisors); Cooper's Express, Inc. v. Interstate Commerce Com., 330 F.2d 338 (1st Cir. 1964) (records required to be kept by interstate motor carriers); Hughes v. Johnson, 305 F.2d 67 (9th Cir. 1962) (records required to be kept by a business engaged in storage of migratory game birds taken by hunters); State v. Strover, 97 N.J. 391, 378 A.2d 1175 (1984) (bookkeeping records required to be kept by attorneys pursuant to court rules); Carr v. South Dakota Department of Labor, Unemployment Insurance Division, 355 N.W. 2d 10 (S. Dak. 1984) (payroll records required to be kept by employers pursuant to unemployment insurance law); State v. Kirkland, 655 S.W. 2d 140 (Tenn. 1983) (logs of purchases required to be kept by jewelry and precious metals dealers); Liberman v.

Cervantes, 511 S.W. 2d 835 (Mo. 1974) (records required to be kept by licensed pawnbroker); State Real Estate Com. v. Roberts, 441 Pa. 159, 271 A.2d 245 (Pa. 1970) (records required to be kept by licensed real estate dealer), cert. denied, 402 U.S. 905 (1971).

In sum, whatever minimal expectations of privacy radio and television service dealers may ordinarily have in their business records, they can have none in the written estimates, work orders, and final bills which they are required by law to keep and make available for inspection. The Fourth Amendment, therefore, is not a bar to their inspection without a warrant.

III. The Statute Authorizing the Inspection of the Required Records At Issue Here Is At Least As Protective of Privacy Interests As Similar Statutes Already Approved By This Court

The decisions of this Court dealing with administrative inspections have consistently emphasized a particular concern and the necessity of corresponding safeguards. The concern is the unconstrained exercise of discretion by officers in the field. The corresponding safeguard is often the requirement of prior approval by a magistrate, but may also be found, where the privacy interests implicated by a search are minimal, in the existence of administrative standards that give reasonable direction and limits to the investigatory power. New Jersey v. T.L.O., 105 S.Ct. 733, 744 n.8 (1985); Delaware v. Prouse, 440 U.S. 648, 654-655

(1979).

The concern of the Court is apparent upon an analysis of the statutory grants at issue in Camara v. Municipal Court, 387 U.S. 523 (1967), See v. City of Seattle, 387 U.S. 541 (1967), and Marshall v. Barlow's Inc., 436 U.S. 305, the three principal cases on which appellants rely. Section 503 of the San Francisco City Housing Code, the ordinance under consideration in Camara, gave city inspectors the power to enter "any building, structure, or premises in the City to perform any duty imposed upon them by the Municipal Code." This included the duty (among others) of determining through periodic inspection whether conditions existed in "residential buildings, dwelling units and neighborhoods" that might be found to be "dangerous, substandard, unsanitary or

obsolete and deficient," San Francisco Housing Code Sec. 101; Part III, Sec. 86, San Francisco Municipal Code. In See, which involved an attempted inspection of a locked commercial warehouse, the authority was only slightly more restricted. The relevant statute provided for entry by the Fire Chief into buildings other than dwellings "as often as may be necessary for the purpose of ascertaining and causing to be corrected any conditions liable to cause fire, or any violations of the provisions of this Title, and of any other ordinance concerning fire hazards." Seattle Fire Code Sec. 8.01.050, quoted 387 U.S. at 541. These expansive grants of authority, if upheld, would have permitted an inspector to roam at will through any portion of a dwelling house in one case, or commercial property in

the other, with

> [t]he occupant having no way of knowing whether enforcement of the municipal code involved required inspection of his premises, no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself is acting under proper authorization. . . The practical effect of this system is to leave the occupant subject to the discretion of the official in the field. . . .

387 U.S. at 532. By giving an occupant the right to demand a warrant, the Court sought to insure that "the decision to enter and inspect will not be the product of the unreviewed discretion of the enforcement officer in the field." See v. City of Seattle, 387 U.S. at 545. See Stanford v. Texas, 379 U.S. 476, 485 (1965).

The statutory grant authorizing the administrative search at issue in Marshall was also extremely broad. Section 8(a) of the Occupational Safety

and Health Act of 1970 (OSHA), 29 USC Sec. 657(a), gave federal inspectors the power to enter any place "where work is performed by an employee of an employer" to inspect and investigate all "pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein." This grant of authority, said the Court,

> devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search. A warrant, by contrast, would provide assurances from a neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria. Also, a warrant would then and there advise the owner of the scope and objects of the search, beyond which limits the inspector is not expected to proceed. These are important functions for a warrant to perform, functions which underlie the Court's prior decisions that the Warrant Clause applies to inspections for compliance with regulatory statutes. (436 U.S. at 324-25).

By contrast, the statutory grant of authority at issue in Donovan v. Dewey, 457 U.S. 594 (1981), did not leave "the frequency and purpose of inspections to the unchecked discretion of government officials" (id. at 604). The statute authorizing warrantless inspections of underground and surface mines requires inspection of all mines, and specifically defines the frequency of inspections. The standards mine operators are required to meet are all specified and known to them. In these circumstances, the Court found it difficult to see what additional protection a warrant requirement would provide since "[t]he discretion of government officials to determine what facilities to search and what violations to search for is [already] directly curtailed by the regulatory scheme." (id. at 605). That being the case, the

Court expressed itself willing to defer to the legislative determination that warrantless inspections were necessary to enforce mine safety. See also United States v. Martinez-Fuerte, 428, U.S. 543, 559 & n.13, 565-566 (1978); South Dakota v. Opperman, 428 U.S. 364, 374 - 375 (1976).

It is significant in the present case that the regulatory scheme leaves virtually no discretion in the hands of the Department's inspectors in the field. The decisions whether, how, and whom to inspect are made centrally. Dealers are chosen for inspection randomly by computer, and the conduct of the inspections is made uniform by the use of a standard form. Most importantly, the inspections are limited by statute to examining the records required by law to be kept and to

verifying that the mandatory notices to consumers are posted conspicuously and available at each dealer's shop. The inspectors are given no authority to conduct general searches of the premises of licensed dealers, either with or without the consent of the licensees. In these circumstances, nothing is gained through individualized review of the inspector's authority by a magistrate in advance of inspection.

IV. The Established Procedures Under which the Inspection of Required Records Is Conducted Provide More Protection to these Appellants than the Traditional Warrant Procedure

A point that must be stressed is that the decisions of the Commissioner suspending and revoking the appellants' licenses and fining them each $300 are not self-executing. They require

judicial assistance to enforce: an injunction to compel compliance with the Commissioner's orders and a judgment in a civil action to recover the penalties. New York City Administrative Code Sec. 773-5.0. Even if appellants themselves had not commenced judicial proceedings, they would still have had the opportunity to raise in court any objections they had to the inspections. Cf. Friedman v. Hi-Li Manor Home for Adults, 42 N.Y.2d 408, 414, 397 N.Y.S.2d 967, 969, 366 N.E.2d 1322, 1324 (1977) (holding that recipient of office subpoena duces tecum may properly raise his objections when the official issuing the subpoena first seeks judicial sanction for non-compliance). Thus, petitioners were guaranteed the opportunity of judicial review of the reasonableness of the inspections prior to their suffering any

consequences for refusing to comply. The availability of judicial review in the instant case protects against any arbitrary actions and satifies the requirements of the Fourth Amendment.

A search pursuant to a warrant, particularly of a person's books and papers, may involve a substantial invasion of privacy. The fundamental evil at which the Fourth Amendment was directed was the sweeping exploratory search through a person's papers and belongings conducted pursuant to a general warrant. The Amendment seeks to curtail such searches by requiring warrants that describe particularly the things to be seized. Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971). But no matter how particularly a paper is described, the officers executing it may still have to search and read all a

person's papers in order to find the one named in the warrant. Zurcher v. Stanford Daily, 436 U.S. 547, 580 n.7 (1978) (Stevens, J., dissenting); see, T. Taylor, Two Studies in Constitutional Interpretation, 67-68 (1969). Moreover, the warrant ordinarily issues ex parte, and the search it authorizes may be affected by the threat or use of force. The individual has little choice but to submit to the search no matter how intrusive it may be.

By way of contrast, the inspections of licensees' records attempted here involved neither an actual search nor the threat or actual use of force. Rather, each licensee was asked to furnish the inspector with the documents to be inspected, and when that request was refused, the Commissioner's only recourse was to administrative and judicial

process. See Donovan v. Lone Steer, Inc., 104 S. Ct. 769 (1984). These procedures compare favorably to the warrant procedure, and provide as much, if not more, protection to the legitimate interests of the licensees.

The development of Fourth Amendment protections against compulsory production of a person's papers and records derives substantially from United States v. Morton Salt Co., 338 U.S. 632, 651-654 (1950), in which the Court upheld the authority of the Federal Trade Commission to require companies within its jurisdiction to file detailed reports concerning their activites. The Morton Salt Co., nineteen other salt producers, and their trade association had been ordered to cease and desist from certain monopolistic practices in connection with pricing, producing and marketing salt.

Several years later, in order to satisfy itself that the producers were continuing to comply with the order, the Commission demanded from each of them a "complete statement" of the "prices, terms, and conditions of sale of salt, together with books or compilations of freight rates used in calculating . . . [the prices] . . . after January 11, 1944" (id. at 637). Two of the producers refused to comply with the demand, and the Commission filed suit, asking for injunctive relief to compel the two companies to report as directed and judgments against the produers for the statutory penalty of $100 for each day the companies were in default (id. at 635 n.1 & 637). The Court held that neither probable cause nor a prior judicial determination of the validity of the Commission's order was necessary. The Fourth Amendment is

satisfied "if the inquiry is within the authority of the agency, the demand is not too indefinite and the information is reasonably relevant," and by the availability of judicial review "[t]o protect against mistaken or arbitrary orders," after the party has resorted to procedures within the agency to modify or quash the demand. Id. at 640, 652-653, 654. See also Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 217 (1946).

More recently, in California Bankers Assn. v. Shultz, 416 U.S. 21, 59-67 (1974), the Court held that regulations requiring banks and other financial institutions to keep certain records and to file reports concerning currency transactions exceeding $10,000, violation of which would subject those required to report to civil or criminal penalties, did not abridge any Fourth Amendment

rights. The Court observed:

> The regulations do not impose unreasonable reporting requirements on the banks. . . . [and the] information [required to be filed] is sufficiently described and limited in nature, and sufficiently related to a tenable congressional determination as to improper use of transactions of that type in interstate commerce, so as to withstand the Fourth Amendment challenge made by the bank plaintiffs. "[T]he inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant. 'The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable.'" United States v. Morton Salt Co., supra, at 652-653; see Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 208 (1946).

The authority to inspect records, which is at issue in the present case, is essentially an analogue of the authority conferred on administrative agencies to issue administrative subpoenas duces tecum or to compel reports to be filed. In Marchetti v. United States, 390 U.S. 39, 56 n.14 (1968), the Court noted that

there is no "meaningful difference between an obligation to maintain records for inspection, and such obligation supplemented by a requirement that those records be filed periodically with officers of the United States. We believe, as the United States itself argued in [Shapiro v. United States, 335 U.S. 1 (1948)], that '[r]egulations permit records to be retained, rather than filed, largely for the convenience of the persons regulated'." Accord, Mackey v. United States, 401 U.S. 667, 708 n. 8 (1971) (Brennan, J. concurring).

Thus, as with administrative subpoenas duces tecum and compulsory reporting requirements, no warrant is required to exercise the power to inspect documents. The Fourth Amendment is satisfied if the authority to inspect is exercised reasonably and if judicial

review is available before a person is ultimately required to submit to the inspection.

Conclusion

The appeal should be dismissed for lack of jurisdiction. Alternatively, the judgment of the New York Court of Appeals should be affirmed.

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